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OFFICE

In The

Supreme Court of the United States

October Term, 1998

LILLIAN DERRYBERRY,
Individually, and as Next Friend of
James L. Bryant,

Petitioner,

v.

NATIONSBANK OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas First Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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134 pp

QUESTIONS PRESENTED

1) Does a bank's exercise of a contractual right of set-off, against an account containing social security benefits, violate the federal Social Security anti-attachment provision at 42 U.S.C. § 407, which protects Social Security benefits from assignment, attachment, transfer, execution, levy, garnishment or other legal process?

2) Does a bank's exercise of set-off against direct-deposited social security benefits, before the beneficiary has access to them, violate the Social Security anti-attachment provision at 42 U.S.C. § 407?

3) Is the Texas Court of Appeals decision, that permits a bank to exercise a contractual right of set-off, contained in a standard deposit agreement, against an account containing social security benefits and against direct-deposited social security benefits before they reach the beneficiary, inconsistent with 42 U.S.C. § 407? Is the decision inconsistent with the U.S. Supreme Court decision in *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973)? Does the decision violate the Supremacy Clause of the U.S. Constitution?

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Set out in *Appendix B.*

Texas First Court of Appeals final Opinion and Judgment: Lillian C. Derryberry, Individually, and as Next Friend of James L. Bryant v. NationsBank of Texas, N.A., Formerly Known as N.C.N.B. Texas National Bank, #01-95-01438-CV, March 5, 1998, not published but appearing at 1998 WL 93275.
Set out in *Appendix A.*

Withdrawn Original Opinion and Judgment of Texas First Court of Appeals: Lillian C. Derryberry, Individually, and as Next Friend of James L. Bryant v. NationsBank of Texas, N.A., Formerly Known as N.C.N.B. Texas, #01-95-01438-CV, October 30, 1997.
Set out in *Appendix C.*

Final Judgment of trial court: Lillian C. Derryberry, Individually, and as Next Friend for James L. Bryant v. The NationsBank, Formerly Known as N.C.N.B. Texas National Bank, District Court of Walker County, Texas, #17,834, September 28, 1995.
Set out in *Appendix D.*

JURISDICTION

The judgment and decision for which Petitioner seeks review was entered by the First Court of Appeals of Texas on March 5, 1998. On August 25, 1998, the Texas Supreme Court denied both Petitions for Review. No motion for rehearing was filed.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(a) to review a final judgment of the highest court of a state where a right under a U.S. statute is claimed. The judgment sought to be reviewed involves a right under 42 U.S.C. § 407.

This petition for a writ of certiorari is filed pursuant to Supreme Court Rule 13(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The central statute involved in this case is 42 U.S.C. § 407, Appendix E, which says:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

Other statutes which are relevant are:

U.S. Constitution, art. VI., cl.2, Supremacy Clause, Appendix F.

38 U.S.C. § 5302, Waiver of Veteran's Overpayments, Appendix G.

31 U.S.C. § 3332, Required Direct Deposit, Appendix H.

STATEMENT OF THE CASE

Summary of Case

Lillian Derryberry and her husband opened a checking account at Huntsville National Bank in 1985 and signed a standard deposit agreement which gave the bank a set-off against any funds in the account for any future debt they might owe the bank. They had Mr. Derryberry's Veteran's disability checks direct-deposited into the checking account. After Mr. Derryberry's death in 1990, Mrs. Derryberry had the Social Security survivor's benefits payments for herself and her minor son direct-deposited into the checking account. Three months after Mr. Derryberry's death, the bank exercised a contractual right of set-off against all funds in the account, held the account frozen until the direct-deposited Social Security benefits arrived about three weeks later, seized the Social Security benefits of Mrs. Derryberry and her son, and then applied all the funds in the account, including direct-deposited Social Security benefits, to a debt owed by Mrs. Derryberry to the bank.

Mrs. Derryberry brought an action in a Texas state court, contending that 42 U.S.C. § 407 prohibited the bank

from lawfully seizing the social security benefits of her minor son and herself. The trial court held that the bank's self-help mechanism of set-off was not prohibited by 42 U.S.C. § 407 because it is not a legal process. The Texas Court of Appeals agreed and issued a decision holding that a bank can lawfully exercise a contractual right of set-off against direct-deposited social security benefits, notwithstanding the federal statute in question. The Texas Supreme Court denied the petition for review and let the Texas Court of Appeals decision stand.

PROCEEDINGS BELOW

Mrs. Derryberry and her minor son sued NationsBank in state court for freezing her checking account and attaching their social security benefits, and failure to provide credit-life insurance, raising various contract and tort claims. The trial court dismissed all claims on defendant's motion for directed verdict.

The Texas Court of Appeals affirmed the trial court's holding that 42 U.S.C. § 407 does not prohibit the bank's exercise of a contractual right of set-off against direct-deposited Social Security benefits. (Appendix A).

On issues not raised in this Petition to this Court, the state court of appeals also affirmed the dismissal of contract and tort claims related to the credit life insurance claim, and remanded a breach of contract failure to pay on demand claim for a factual determination as to when the bank knew of Mr. Derryberry's death.

The Court of Appeals denied a Motion to Rehear, withdrew its first decision (Appendix C) and reissued the same decision (Appendix A).

The Texas Supreme Court refused to review the case. (Appendix B).

The federal issues of federal statutory protection of Social Security benefits from creditors and the federal supremacy clause were properly presented and ruled on at every stage of the state court proceedings.

Federal Issues Raised Below

A. Trial Court

Plaintiff Derryberry raised the federal statutory issue, 42 U.S.C. § 407, in the state trial court First Amended Complaint, paragraph XX, which states:

> Defendant wrongfully withheld and exercised control, to Plaintiffs' detriment, over OASDI benefits which were held in DERRYBERRY'S checking account. The NATIONSBANK subsequently made an authorized disbursement of such funds to the Veterans Administration without any lawful authority to do so, and in violation of 42 U.S.C. § 407.

Plaintiff Derryberry also set out the underlying factual allegations regarding receipt of Social Security benefits, direct-deposit, freezing of account and attachment of Social Security benefits in Plaintiff's First Amended Complaint, paragraphs I, II, X, XI, XII, XIII, and XX, set out in Appendix I.

Also, Plaintiff orally argued this issue to the Texas trial court in the argument regarding motions for directed

verdict, recorded in the trial transcript on pages 300-301, and 325-337, Court Reporter's Record of the arguments on the Motion for Directed Verdict, set out in Appendix J. In conclusion, plaintiff summarized the argument to the trial court:

> Ms. Willett:
>
> Your Honor, I don't dispute that they could have even a common law right of set-off as well as a contractual right of set-off, but I don't think that the right of set-off can supersede the federal statute that protects social security benefits.

B. Texas Court of Appeals

Plaintiff raised the federal statutory issues of 42 U.S.C. § 407 and the federal supremacy clause in the Texas Court of Appeals in Point of Error 9 at page xii of Brief of Appellant, which reads:

> POINT OF ERROR 9. Allowing a bank to exercise a set-off against direct-deposited Social Security benefits, before beneficiary has access to them, would conflict with the language and purpose of 42 U.S.C. § 407(a) and violate the Supremacy Clause of the United States Constitution, art. VI, cl.2.

Further, plaintiff discussed this argument in detail in the Court of Appeals in pp. 10 to 22 of Appellant's Brief, set out in Appendix L.

C. Texas Supreme Court

Plaintiff raised the federal issues in the Texas Supreme Court in the Petition for Review, p. ix, Issues Presented, which reads:

1) Does a bank's exercise of a contractual right of set-off, against an account containing social security benefits, violate the federal Social Security anti-attachment provision at 42 U.S.C. § 407, which protects Social Security benefits from assignment, attachment, transfer, execution or levy.

2) Does a bank's exercise of set-off against direct-deposited social security benefits, before the beneficiary has access to them, violate the Social Security anti-attachment provision at 42 U.S.C. § 407.

3) Is the Court of Appeals decision, that Texas law permits a bank to exercise a contractual right of set-off against an account containing social security benefits and against direct-deposited social security benefits before they reach the beneficiary, inconsistent with 42 U.S.C. § 407? Is the decision inconsistent with the U.S. Supreme Court decision in *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973)? Does the decision violate the Supremacy Clause of the U.S. Constitution?

Further, plaintiff discussed this argument in detail in the Texas Supreme Court in pp. 5 through 13 of the Petition for Review, set out in Appendix M.

Federal Issues Ruled On Below

A. Trial Court

The Texas trial court dismissed all plaintiffs claims, in a Final Judgment, set out in Appendix D, and explained the reason for his ruling on page 337 of the

Transcript of trial court proceedings, Appendix K, by saying:

> The statute just talks about levy, execution, attachment, garnishment, and other legal process. This is a contractual process, not a legal process.

B. Texas Court of Appeals

The Texas Court of Appeals affirmed the trial court's ruling regarding the federal claim, and said at pages 12-13 of its decision:

> *Set-off Against Social Security Benefits on Deposit*
>
> In point of error nine, Lillian argues the trial court erred in ruling that NationsBank properly exercised a set-off against the social security benefits in her account. Lillian bases her argument on the spendthrift provision of the Social Security Act –
>
> > The right of any person to any future payment under this title . . . shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title . . . shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> 42 U.S.C. § 407(a) (1988)
>
> Two reported cases addressed the specific issue of whether a bank can set-off against a customer's account into which social security benefits have been deposited. Both held that the

> bank's set-off did not violate section 407(a) because set-off is not a "legal process." *Frazier v. Marine Midland Bank*, 702 F. Supp. 1000, 1003 (W.D.N.Y. 1988). *Gillespie v. Cherry Creek Nat'l Bank*, 41 B.R. 810, 812 (Bankr. D. Col. 1984); *see also Banco Central de Reserva v. Riggs Nat'l Bank*, 919 F. Supp. 13, 17 (D.D.C. 1994) (citing *Frazier* and concluding that, under a similar spendthrift provision of the Federal Sovereign Immunities Act, the legal processes of "[a]attachment and execution are fundamentally different from set-off"). In *Gillespie*, the court stated "set-off is a self-help procedure . . . not a legal process" and "social security benefits are not exempt from its reach." *Gillespie*, 41 B.R. at 812.
>
> We agree that set-off is a self-help remedy. Therefore, a bank's use of its contractual set-off procedure to settle a depositor's obligation to the bank is not the type of "legal process" contemplated by section 407(a). *Frazier*, 702 F. Supp. at 1003.
>
> Lillian's ninth point of error is overruled.

See Court of Appeals decision, Appendix A, pp. A-12 to A-13.

C. Texas Supreme Court

The Texas Supreme Court denied the Petition for Review, Appendix B, thus refusing to review the Court of Appeals decision.

FACTS

Lillian Derryberry and her husband opened a checking account with Huntsville National Bank in 1985 into which his Veteran's disability benefit checks were direct-deposited. Occasionally they took out loans with Huntsville National Bank and always purchased credit life insurance on Mr. Derryberry, because he was disabled and had many health problems, including hypertension, heart problems, diabetes, and visual problems, which were known to the bank personnel.

On April 6, 1990, Lillian Derryberry went to Huntsville National Bank to renegotiate a 1989 loan to lower the payments. She went alone because her husband was sick. She signed a new loan agreement which lowered payments and still provided credit life insurance on her husband Wayne Derryberry. Mr. Derryberry came to the bank a day or so later to sign the loan papers, and a bank employee "helped" him by showing him where to sign.

Mrs. Derryberry's husband died on April 19, 1990, about two weeks after he signed the new loan agreement with Huntsville National Bank. Mrs. Derryberry informed Huntsville National Bank, and a bank employee, Gay Clements, assisted her in filling out an application for the credit life insurance policy to pay off the loan. She also told the Veteran's Administration (VA) of her husband's death; however, the VA continued to direct-deposit VA benefit checks into their checking account for April, May, and June. Mrs. Derryberry filed a Widow's Request for Waiver of Overpayment, under 38 U.S.C. § 5302, with the VA and was never required to repay the overpayment by

the VA. She advised the bank after her Waiver Request had been filed.

In May or June, Mrs. Derryberry and her adopted son (natural grandson), James Bryan began receiving Social Security Survivor's benefits of $386.00 each per month, which were direct-deposited into the checking account at Huntsville National Bank. On May 31, 1990 the F.D.I.C. took over Huntsville National Bank, and NCNB Bank (now called NationsBank) assumed ownership of the bank, but most of the employees remained the same, and Lillian Derryberry continued to deal with the same employees.

In July of 1990 NationsBank informed Mrs. Derryberry that her credit life policy would not pay off the loan. The reason given for the refusal to pay was that Mr. Derryberry had signed a certificate of good health when he, in fact, was not in good health. That was the first time Mrs. Derryberry saw the certificate of good health allegedly signed by her husband sometime after April 6. Mrs. Derryberry was then indebted to the bank for the loan payments which she had not made.

Also in July of 1990, NationsBank received a letter from the VA about the overpayment of veteran benefits after Wayne Derryberry's death and the bank's potential liability for direct deposits which the bank accepted after it knew of the beneficiary's death. Lillian Derryberry was not required to repay the benefits to the VA; however, she was contractually indebted to the bank for whatever amount the bank owed to the government, pursuant to a provision in her checking account deposit agreement. The

bank's standard deposit agreement had two provisions contained in the fine print of the back page which read:

> DIRECT DEPOSITS – If, in connection with a direct deposit plan, we deposit any amount in this account which should have been returned to the Federal Government for any reason, you authorize us to deduct the amount of our liability to the Federal Government from this account or from any other account you have with us, without prior notice and at any time, except as prohibited by law. We may also use any other legal remedy to recover the amount of our liability.
>
> SET-OFF – By signing this form you each agree that we may at any time (without prior notice, except as prohibited by law) set-off the funds in this account against any debt owed to us now or in the future, by any of you having the right of withdrawal, subject to any limit on the right of withdrawal from this account by such person or legal entity.
>
> This right of set-off does not apply to this account if (a) it is an IRA or a tax-deferred retirement account, or (b) the debt is created by a consumer credit transaction under a credit card plan; or (c) the debtor's right of withdrawal arises only in a representative capacity.

On July 12, the account balance was $928.95. With no notice, NationsBank put a hold on Mrs. Derryberry's checking account and began bouncing all of her checks presented after July 12, 1990. Mrs. Derryberry tried to stop the direct-deposit of her August Social Security payments, but it was too late. The bank held her account frozen until the August Social Security benefits for Mrs.

Derryberry and her son were received on August 3, 1990. Then they exercised a set-off of $1712.97 ($928.95 from Mrs. Derryberry's checking account, plus the $386.00 August Social Security check for herself and the $386.00 August check for her minor son). On August 3, the U.S. Treasury notified NationsBank of the amount the government was reclaiming from the bank for Veteran's benefits received by Electronic Fund Transfer after the death of Mr. Derryberry. On August 7, the bank took the August Social Security benefits and $928.95 already in the account, and used it to pay on the bank's debt to the U.S. Treasury, and notified Mrs. Derryberry after the fact.

NationsBank had constructive knowledge, if not actual knowledge, that the August direct deposits were social security benefits and that one was for the minor child, James Bryan. The bank's direct deposit sign-up form shows the name of the beneficiary and the type of benefit checked is social security. Despite the federal law protecting social security benefits from attachment, a NationsBank employee testified that the bank had no procedures for treating social security benefits differently from other funds.

Lillian Derryberry nearly had a nervous breakdown and went to the hospital for treatment. The Social Security survivor's benefits were her only source of income, and she testified as to the devastating effects on herself and her minor son, worries and problems about supporting herself and her child, and the threat of arrest for a bounced check.

ARGUMENT FOR ALLOWANCE OF WRIT

Summary of Argument

Reasons to Grant Review

The Texas Court of Appeals has decided an important question of federal law that should be but has not been resolved by the U.S. Supreme Court. This case involves construction of a federal statute, and the Texas decision conflicts with a U.S. Supreme Court ruling and violates the Supremacy Clause of the U.S. Constitution. The error of law by the Texas appellate court is important to the country's jurisprudence because it impairs the ability of a vulnerable segment of the population (elderly, disabled, and children) to meet their basic needs for survival, and should be corrected by this Court.

Set-Off by Bank Against Social Security Benefits

The bank's exercise of a contractual right of set-off against social security benefits in a customer's account violates the Social Security anti-attachment provision at 42 U.S.C. § 407.

The Court of Appeals held that NationsBank's contractual right of set-off (exercised in August of 1990) arose from a contractual provision in the deposit agreement signed by Mrs. Derryberry in 1985. (Appendix N). An assignment of interest in future social security payments is specifically prohibited by 42 U.S.C. § 407.

The Court of Appeals held that a private agreement between the bank and social security beneficiary that gives the bank a right of set-off against social security benefits is not prohibited by 42 U.S.C. § 407 because it is

not a legal process. That decision is in conflict with the statute and *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973), and violates the Supremacy Clause of the U.S. Constitution, art. VI, cl.2.

The U.S. Supreme Court has not decided a case directly on a bank's exercise of a set-off against direct-deposited Social Security benefits before the beneficiary has access to them. There are several U.S. Supreme Court decisions (see Argument) which hold that an anti-attachment provision in a benefits program prohibits various types of claims that would thwart the purposes of the benefits program. Allowing a bank to set-off against direct-deposited social security benefits before they reach the beneficiary thwarts the purpose of the anti-attachment provision of the Social Security Act, which is to ensure that benefits be available to recipients to meet current living expenses.

ARGUMENT

Reason to Grant Petition for Review

The Texas Court of Appeals has decided a federal issue of importance, possibly survival, to disabled, elderly, poor, and minor persons. There were no cases involving exercise of a set-off against direct-deposited social security benefits before they reach the beneficiary. The Texas court relied on *Frazier v. Marine Midland Bank*, 702 F.Supp. 1000 (W.D.N.Y. 1988) and *Gillespie v. Cherry Creek National Bank*, 41 B.R. 810 (Bankr.D.Colo. 1984), in holding that NationsBank's seizure of Lillian Derryberry's and James Bryan's August Social Security

checks did not violate the Social Security anti-attachment law. Neither *Frazier* nor *Gillespie* involved taking direct-deposited Social Security benefits before they reached the beneficiary. *Frazier* involved in-person cash deposits. The issue in *Gillespie* was a preferential transfer in a bankruptcy and the court said that the debtor had agreed to the bank's taking monthly loan payments out of his account.

After the Texas Court of Appeals decision, the U.S. Tenth Circuit Court of Appeals reached the opposite decision. The Tenth Circuit held that exercise of a contractual right of set-off by a credit union against an account containing Social Security benefits violated 42 U.S.C. § 407. It clearly stated that "setoff constitutes 'other legal process' under § 407." *Tom v. First American Credit Union*, 151 F.3d 1289, 1293 (10th Cir. 1998). The United States Tenth Circuit Court of Appeals also read *Frazier* and *Gillespie* as holding that a bank's exercise of a contractual right of set-off is not prohibited by the Social Security anti-attachment provision; however, it rejected that holding. *Id* at 1292.

Until the highest court of the land has clearly spoken on this issue, other state courts may follow the reasoning of the Texas case (cited at 1998 WL 93275) and these two inapplicable cases and reach the same conclusion, millions of Social Security recipients in the country are vulnerable to having their only source of income disrupted without warning, and NationsBank has court approval to seize direct-deposited Social Security benefits of its customers.

If 42 U.S.C. § 407 does not protect Social Security benefits from a set-off exercised by a bank pursuant to its standard deposit agreement, to satisfy its claim against a depositor for the bank's obligation to the U.S. Treasury for improper handling of post-death Veteran's benefits, then any bank can exercise a set-off against social security benefits for any debt to the bank.

Banks often purchase notes and loans from other creditors, such as home improvement contractors and mortgage companies. Banks could set-off such debts against the accounts of social security beneficiaries which would have been beyond the reach of the original creditors.

All federal benefits will be direct-deposited (by Electronic Fund Transfer from the U.S. Treasury) after January 1, 1999. 31 U.S.C. § 3332(f)(1). Banks are able to use the set-off provision in their deposit agreements to exercise claims against social security benefits and deprive the recipients of their use. Banks are thus allowed a privileged position as creditors, and social security recipients, at least those in Texas, are deprived of the protection intended by 42 U.S.C. § 407.

Because of the importance of this issue to a very vulnerable segment of the population and the absence of federal cases this Court should address the issue. The Texas Court of Appeals has decided an important question of federal law that has not, but should be settled by the U.S. Supreme Court. Supreme Court Rule 10(c).

The Texas Court of Appeals decision is in conflict with a federal statute and thus violates the Supremacy Clause, art. VI, cl. 2, of the U.S. Constitution. Because the

Court of Appeal's decision conflicts with the U.S. Supreme Court decision in *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973), (discussed *infra*) this Court should grant review. U.S. Supreme Court Rule 10(c).

Social Security Anti-Assignment Provision

Social Security benefits enjoy a special status under federal law. They are afforded a broad protection from the claims of creditors in the anti-assignment provision of the Social Security Act.

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

42 U.S.C. § 407.

This protection afforded Social Security benefits is maintained even after they are deposited in a checking or savings account and are co-mingled with funds from other sources. *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416 (1973); *NCNB Financial Services, Inc. v. Shumate*, 829 F.Supp. 178, 180 (W.D.Va. 1993). Relying on *Philpott*, *Shumate* held that the bank customer was entitled to protection, from NCNB (later called NationsBank)'s lien,

of that portion of his bank account funds "reasonably traceable to Social Security income." *Id.* at 180-81. To determine what dollar amount of funds is entitled to protection, the court said to follow the "first in, first out" accounting method: the first money deposited into the account is considered the first money spent out of the account. *Id.* at 181.

Here it is clear that at least the August Social Security benefits are clearly identifiable and retain their character as Social Security benefits according to the first in, first out principle. NationsBank put a hold on Lillian Derryberry's account in July of 1990 and held it frozen until after August 3, 1990, when Social Security benefits of $386.00 each for Mrs. Derryberry and her son were direct-deposited into her checking account. Mrs. Derryberry was not able to stop the electronic transfers of the August Social Security benefits to the bank. Mrs. Derryberry and her son never had any access to that money. There is no question that the August Social Security deposits of $386.00 each are traceable to Social Security benefits since Mrs. Derryberry could not access the account on August 3 because it had been frozen in the prior month.

The Texas Court of Appeals said that the bank took Lillian Derryberry's and James Bryan's social security benefits by "set-off", which does not require judicial intervention and therefore is not prohibited by 42 U.S.C. § 407. The Texas court said the bank acquired its right of set-off from the deposit agreement which Lillian Derryberry signed with Huntsville Bank in 1985. (Appendix, N-1). Lillian Derryberry and the infant James Bryan

were neither receiving nor entitled to social security benefits in 1985. By the Texas Court of Appeal's reasoning, Lillian Derryberry must have made a contingent assignment in 1985 of part of their future rights. 42 U.S.C. § 407(a) specifically prohibits any transfer or assignment of rights to any future payments.

Clearly all the rights in the social security benefits, present and future, rested in Lillian Derryberry and James Bryan, but for the set-off agreement. Even after the benefits were deposited in an account and co-mingled with other funds, the statute protected their rights. When and how did they lose those rights? Did the 1985 deposit agreement transfer the plaintiffs' rights to the bank? If so, it was an assignment of a right to future payment and is prohibited by the plain language of § 407(a). Did the 1985 deposit agreement waive the plaintiffs' protections under 42 U.S.C. § 407? Either interpretation thwarts the statutory purpose of assuring that benefits reach the beneficiaries and are available to meet current needs.

In *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973), a Social Security recipient had received some welfare benefits, and as a condition of receiving that assistance, he had to execute an "agreement to reimburse." *Id.* 409 U.S. at 414, note 2. The following year, he began receiving Social Security benefits which were deposited into a bank account by his trustee, Philpott. The New Jersey County Welfare Board sued to reach the bank account under the terms of the agreement to reimburse.

In a short five page decision, the U.S. Supreme Court held that the Social Security anti-assignment provision, 42 U.S.C. § 407, barred the State of New Jersey from

reaching the Social Security benefits. *Id.*, 409 U.S. 414-417. Like NationsBank, New Jersey had a written agreement with the Social Security beneficiary which gave them an interest in his property (including his bank account), but the Supreme Court said federal law barred New Jersey from reaching the Social Security money in that account pursuant to that agreement.

Philpott held that § 407 imposes a "broad bar against the use of any legal process to reach all social security benefits." 409 U.S. 417. In the case at bar, the Texas court held that a set-off agreement was a self-help procedure, not a legal process, and thus was not covered by the Social Security anti-assignment provision. The federal statutory prohibition covers actions, such as "assignment" and "transfer" which do not involve court proceedings. This Texas ruling is in conflict with 42 U.S.C. § 407, and is preempted by federal law under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl.2.

The U.S. Supreme Court has interpreted broadly the anti-attachment provisions in other federal benefits programs and has held state common law or statutory provisions preempted by the Supremacy Clause of the United States Constitution when they conflicted with the purposes of anti-attachment provisions. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the court considered an anti-attachment provision which provided that railroad retirement benefits were protected from "garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." *Id.* 439 U.S. at 576. The award to the wife of a community property interest in her husband's railroad

retirement benefits did not appear to the state court to be prohibited by the specific terms of the anti-attachment provision in question, since it was not a garnishment, attachment, or other legal process. However, the Court said the award would conflict with the Congressional purpose of preserving the benefit for the beneficiary, and thus was prohibited by the Supremacy Clause. *Id.* 439 U.S. at 590.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), the Court held that the state court community property division of military retirement benefits was precluded by federal law because it conflicted with the Congressional purpose of preserving the entire benefit for use by the beneficiary. Unlike the Social Security Act, the military retirement benefits statute did not have a specific anti-attachment provision. However, the Court viewed the statutory scheme in its entirety, found that Congress intended that the benefits reach the beneficiary, and concluded that if the benefits could be reached by state process or otherwise, the objectives of the federal program would be impaired. *Id.* 453 U.S. at 228-232.

Blacks Law Dictionary (5th ed. 1979) at p. 1230 defines a "set-off" as a counterclaim, a legal process. In the deposit agreement, the term obviously means "offset," which is a deduction by which a given claim may be reduced. *Id.* at 979. Although the Court in *McCarty* did not use the term "set-off," it did, by way of dicta, say the state court could not get around the federal statute by use of an "offset." "But even if there were no explicit prohibition against 'anticipation' here, it is clear that the injunction against attachment is not to be circumvented by a

simple expedient of an **offset** [emphasis added] award." *McCarty v. McCarty*, 453 U.S. at 229, note 22.

In *Rose v. Rose*, 481 U.S. 619 (1987), the Court held that a state court order requiring child support payments out of veteran's disability benefits was not preempted by federal law because it would not conflict with the purpose of the statutory benefits scheme. In contrast to the benefits schemes involved in its prior cases, the Supreme Court pointed out that the veteran's disability benefits were intended to support not only the veteran but also his family. Thus, a holding that the anti-attachment provision was not applicable to child support payments would not undermine the federal purpose but rather further it. *Id.* 481 U.S. at 634. In the case at bar, allowing the bank to exercise a set-off against Mrs. Derryberry and her son's social security benefits would undermine the purpose of the federal Social Security statute of making benefits available to meet current living expenses of the beneficiaries.

In *Tom v. First American Credit Union*, 151 F.3d 1289 (10th Cir. 1998) the Tenth Circuit reasoned that the purpose of social security was to provide the elderly with a means of subsistence, *id.* at 1293; and that Congress would not choose to protect Social Security beneficiaries from creditors who use the courts, but "leave them at the mercy of creditors who devised their own extra-judicial methods of collecting debts." *Id.* at 1292. The Tenth Circuit held that Congress intended to protect social security funds from all creditors, even those who use self-help remedies such as set-off. *Id.* at 1293.

The U.S. Supreme Court has clearly stated that 42 U.S.C. § 407 imposes a "broad bar against the use of any legal process," *Philpott*, 409 U.S. at 417, and "unambiguously rules out any attempt to attach Social Security benefits." *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988). However, in order for social security benefits to have the full protection of 42 U.S.C. § 407, the Court must go on to say that broad, unambiguous bar includes self-help remedies such as set-offs by banks.

Direct Deposit

Banking institutions should not be allowed to benefit from technological advances to the detriment of social security beneficiaries. Technological advances have eroded protections historically used by Social Security recipients to protect their life-sustaining benefits. Prior to the advent of direct deposits, individuals received benefits personally and could elect not to deposit them into disputed accounts. However, with direct deposits recipients are deprived of the ability to immediately halt the transfer of their benefits.

Beginning January 1, 1999, all recipients of federal benefits will be required to have their benefits direct-deposited via Electronic Fund Transfer. 31 U.S.C. § 3332(f)(1). The Secretary of Treasury can waive the requirement in individual hardship cases. § 3332(f)(2). This new requirement for direct-deposit covers all federal benefit payments. § 3332(j)(3). The Texas Court of Appeals decision will impact all Social Security beneficiaries in Texas and threaten the security of the funds upon which many rely for survival.

To permit banking institutions to intercept these benefits thwarts congressional intent and shifts control of those benefits into the hands of financial institutions. By obstructing the flow of benefits to recipients, banks are undermining the intent of the Social Security Act legislation.

CONCLUSION

Petitioner Lillian Derryberry, Individually and as Next Friend of James L. Bryant, respectfully requests the United States Supreme Court to issue a writ of certiorari to review the decision of the Texas First Court of Appeals Opinion, for which the Texas Supreme Court declined discretionary review.

Respectfully submitted,

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APPENDIX A

Texas First Court of Appeals
final opinion and Judgment. 3-5-98

Opinion issued March 5, 1998

[SEAL]

In the

Court of Appeals

For The

First District of Texas

NO. 01-95-01438-CV

LILLIAN C. DERRYBERRY,
individually and as next friend of
JAMES L. BRYANT, Appellants

V.

NATIONSBANK OF TEXAS, N.A.,
formerly known as N.C.N.B. TEXAS
NATIONAL BANK, Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 17.834

OPINION ON MOTION FOR REHEARING

We deny appellee's motion for rehearing, withdraw our opinion of October 30, 1997 and issue this opinion in its stead.

Appellant, Lillian Derryberry, sued NationsBank for breach of contract, conversion, and violations of the Texas

Deceptive Trade Practices Act (DTPA).[1] The trial court granted NationsBank's motions for directed verdict on each of Lillian's claims. We affirm in part and reverse in part and remand.

BACKGROUND

Wayne and Lillian Derryberry opened a checking account with Huntsville National Bank (HNB) in 1985. Wayne was a veteran of the armed forces and received disability benefits from the Veterans Administration (VA). Those periodic benefits were electronically deposited directly into the Derryberrys' account at HNB.

Wayne died on April 19, 1990. Despite the fact that Lillian informed the VA of Wayne's death, the U.S. Treasury continued the regular deposits of veteran's benefits into Lillian's account at HNB. Lillian also informed her bank that her husband had died. The bank continued accepting those deposits.

Following Wayne's death, Lillian applied for survivor benefits from the Social Security Administration (SSA) for herself and her biological grandson/adopted son, James Bryant. The SSA began electronically depositing benefits of $386.00 per person directly into Lillian's account at HNB.

On May 31, 1990, HNB failed and was taken over by the Federal Deposit Insurance Corporation (FDIC). The operations and deposit liabilities of HNB were assumed

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[1] Tex. Bus. & Com. Code §§ 17.41-17.63 (Vernon 1987 and Supp.1997).

by another bank – NCNB, now NationsBank. There were few visible changes at the bank as a result of this transaction. Most of the HNB employees remained in their same positions and became employees of NationsBank.

In July 1990, the VA notified NationsBank that it would be seeking reclamation of the benefits paid into Lillian's account since the death of Wayne. In late July, NationsBank froze Lillian's account to ensure that there were enough funds to satisfy the reclamation claim. On August 3, 1990, NationsBank received the VA's formal "Notice of Reclamation" demanding the return of $2,502.00 – the sum of the three monthly benefit deposits made since Wayne's death. Following this demand from the VA, the bank set-off the $1,712.97 balance in Lillian's account against the amount owed to the VA; NationsBank then remitted the $1,712.97 to the VA and mailed a notice of the reclamation to Lillian.

Some of the funds remaining in Lillian's account at the time of the set-off were Social Security benefits for Lillian and James, which had been electronically deposited. NationsBank did not know that any of the social security benefits deposited into Lillian's account were for James.

Facts Specific to the Credit Life Insurance

Wayne and Lillian took out a loan from HNB in 1989. In conjunction with that loan, the couple purchased credit life insurance to pay off the loan balance in the event of Wayne's death; that insurance was provided by Navton Life Insurance Co. (Navton). Navton is, it appears, an entity separate and distinct from the bank; there is no

indication that Navton was merely a label under which the bank marketed its own insurance. Attached to the insurance application was an unsigned "Certificate of Good Health." Lillian testified that Wayne was not in good health and had never tried to hide that fact from the bank. The Derryberrys had always purchased credit life insurance on previous loans from HNB, and Wayne had never signed a certificate of good health for those policies.

The 1989 promissory note was refinanced on April 6, 1990 (the April 6 note). Lillian executed the April 6 note on that date; Wayne went to the bank a few days later to sign the note. In conjunction with the April 6 note, Lillian and Wayne purchased credit life insurance and paid the $73.08 premium. Attached to the April 6 note is a certificate of good health signed by Wayne. There is considerable dispute regarding whether Wayne knowingly signed the certificate – Lillian contends that Wayne would not have tried to deceive the bank about his poor health.

Lillian sued NationsBank for breach of contract, conversion, and violations of the DTPA. The trial court granted NationsBank's motions for directed verdict on each of Lillian's claims.

DISCUSSION

In nine points of error, Lillian argues that the trial court erred in granting NationsBank's motion for directed verdict and in denying her own motion for directed verdict. Lillian's contentions can be summarized in four points – the trial court erred by not holding that: (1) NationsBank is liable for conversion of Lillian's funds on

deposit (points of error 2, 3, and 8); (2) social security benefits are protected against set-off (point 9); (3) NationsBank breached its contract with Lillian by refusing to pay funds on deposit in Lillian's account upon her demand (points 4 and 5); and (4) NationsBank breached its contract with Lillian and violated the Texas Deceptive Trade Practices Act by refusing to pay credit life insurance benefits upon the death of her husband (points 6 and 7).[2]

Standard of Review

A directed verdict is proper when the evidence conclusively proves a fact that establishes the movant's right to judgment as a matter of law, or negates the right of the non-movant to judgment; or the evidence offered is insufficient to raise a fact issue on the cause of action at issue. *Metzger v. Sebek*, 892 S.W.2d 20, 40 (Tex. App. – Houston [1st Dist.] 1994, writ denied). The trial court should not weigh the credibility of the witnesses in determining whether a directed verdict is warranted. *Id.*

In reviewing the granting of an instructed verdict, we must determine whether there is any evidence of probative force to raise fact issues on the material questions presented. *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648,

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[2] Lillian's first point of error is merely an omnibus contention that the trial court erred in granting a judgment against her. In her first point, Lillian neither cites any authority nor makes any specific arguments. Accordingly, we disregard Lillian's first point of error as multifarious. *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 570 (Tex. App. – Houston [1st Dist.] 1996, no writ).

649 (Tex. 1994); *Metzger*, 892 S.W.2d at 41. We consider all the evidence in a light most favorable to the party against whom the verdict was instructed and disregard all contrary evidence and inferences; we give the losing party the benefit of all reasonable inferences created by the evidence. *Szczepanik*, 883 S.W.2d at 649; *Metzger*, 892 S.W.2d at 40.

In reviewing the denial of an instructed verdict, we consider all the evidence in the light most favorable to the nonmovant and disregard all evidence to the contrary. *Harris County v. Demny*, 886 S.W.2d 330, 333 (Tex. App. – Houston [1st Dist.] 1994, writ denied). Every reasonable inference is resolved in favor of the nonmovant. *Id.* If there is any conflicting evidence of probative value on any theory of recovery, the issue must go to the jury. *Id.*

Payment on Demand

In points of error four and five, Lillian argues the trial court's granting of NationsBank's motion for directed verdict was in error because NationsBank breached its contract with Lillian by freezing her account and refusing to pay on demand the funds deposited in her account.

NationsBank froze Lillian's account and used the funds on deposit to satisfy the bank's obligation to the U.S. Treasury for depositing Wayne's VA benefits after his death. Lillian argues that the federal regulations governing the direct deposit of VA benefits prevent NationsBank from marshalling the funds in her account for this purpose. Specifically, Lillian relies on the following statement: "The financial institution is not authorized by this

part to debit the account of any party or to deposit any funds from any account in a suspense account or escrow account or the equivalent." 31 C.F.R. § 210.14(c) (1990). However, Lillian ignores the next sentence in the same regulation: "If such action is taken, it must be under authority of State law or the financial institution's contract with its depositor(s)." *Id.*

Here, the deposit agreement executed by Wayne and Lillian when they established their NationsBank account provided, in part, as follows –

> If, in connection with a direct deposit plan, we [NationsBank] deposit any amount in this account which should have been returned to the Federal Government for any reason, you authorize us to deduct the amount of our liability to the Federal Government from this account or from any other account you have with us without prior notice and at any time, except as prohibited by law. We may also use any other legal remedy to recover the amount of our liability.

Therefore, NationsBank had a contractual right to use the funds in Lillian's account to satisfy its obligation to the U.S. Treasury for accepting deposit of posthumous VA benefits for Wayne.

To the extent that NationsBank had a contractual right to freeze the funds in Lillian's account and apply those funds to satisfy its obligation to the Treasury, Lillian argues that NationsBank exceeded the scope of that contractual right. She posits that the contractual rights of NationsBank entitled it to satisfaction out of Lillian's account only so long as NationsBank was not acting "wrongfully." Lillian contends that NationsBank acted

wrongfully in two ways: (1) by continuing to accept VA deposits even after it knew of Wayne's death, and (2) by seizing funds from Lillian's account after she applied for a waiver from the VA which would have absolved the bank from liability for the overpayments.

Addressing her application for a reimbursement waiver, we note that there is no evidence in the record that Treasury had granted Lillian's waiver application, but Lillian testified that she notified the bank that she was seeking a waiver of reimbursement from the VA. On appeal, however, Lillian fails to cite – and our research did not reveal – a single authority indicating that NationsBank's exercise of its contractual rights under the deposit agreement were somehow "wrongful" once it knew that Lillian was seeking a waiver from the VA. Therefore, even if there was a fact issue as to whether NationsBank knew of Lillian's pending attempt to obtain a waiver, there is no indication that such a factual inquiry was legally material.

Lillian also argues that NationsBank continued accepting Wayne's VA benefits for deposit even after it knew of his death. She contends that, once NationsBank had knowledge of Wayne's death, it could no longer rely on the deposit agreement to authorize use of Lillian's funds to satisfy the bank's obligation to Treasury. Lillian's argument is akin to the doctrine of mitigation of damages. *See, e.g., Great Am. Ins. Co. v. North Austin Mun. Util. Dist.*, 908 S.W.2d 415, 426 (Tex. 1995) ("Where a party is entitled to the benefits of a contract and can save himself from the damages resulting from its breach . . . with reasonable exertions, it is his duty to . . . make such exertions."); *Pulaski Bank & Trust Co. v. Texas American*

Bank/Fort Worth, N.A., 759 S.W.2d 723, 735 (Tex. App. – Dallas 1988, writ denied).[3] Lillian contends that NationsBank could have minimized its obligation to Treasury – and, thereby, her contractual obligation to the bank – by telling the VA of Wayne's death. If that is the case, then determining when NationsBank knew of Wayne's death would be a material question of fact.

Lillian argues that NationsBank knew of Wayne's death on May 17, 1990 – the day Lillian and Gay Clements, a HNB employee, signed Lillian's application for benefits under Wayne's credit life insurance policy. NationsBank counters that it did not know of Wayne's death until "sometime in July of 1990," when it learned that a Notice of Reclamation was forthcoming from the VA.

HNB failed on May 31, 1990, and was taken over by the FDIC. The record reflects that NCNB, now NationsBank, assumed the deposit liabilities of HNB from the FDIC on that same day. NationsBank now argues that it cannot be charged with knowledge of Wayne's death on May 17, 1990, because Gay Clements was an employee of HNB at the time. NationsBank contends that it cannot be charged with Clements's knowledge of Wayne's death because, at the time Clements obtained that knowledge,

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[3] In its motion for rehearing, NationsBank argued that the doctrine of avoidable consequences was inapplicable because it was not the plaintiff. This argument elevates form over substance. The only reason NationsBank was not the plaintiff in this action is because it exercised its contractual self-help remedy of seizing Lilian's [sic] account. In fact, NationsBank concedes it did not recover all of the money that they were entitled to, and therefore, could sue Lillian for this underage.

she was an employee of HNB, not NationsBank. NationsBank contends that Clements's knowledge cannot be imputed to a successor entity.

Lillian cites no authority that would charge NationsBank with Clements's knowledge on a successor entity theory. Lillian does, however, argue that, because Clements had knowledge of Wayne's death and Clements was an employee of NationsBank, it makes no difference that Clements learned of Wayne's death while she was employed by HNB. We agree. In *Fireman's Fund Indemnity Co. v. Boyle General Tire Co.*, 392 S.W.2d 352 (Tex. 1965), the Texas Supreme Court stated that "the time, place, or manner in which knowledge is acquired by a servant or other agent is immaterial in determining the liability of his principal because of it." *Id.* at 356 (quoting RESTATEMENT (SECOND) AGENCY § 276, cmt. A (1958)); *see Wellington Oil Co. v. Maffi*, 150 S.W.2d 60, 63 (Tex. 1941) ("Relevant knowledge may have been acquired by the agent before the time of his employment or after he becomes agent, either while acting for himself or for the principal.").

There is conflicting evidence regarding when NationsBank knew of Wayne's death. Lillian argues that, through Clements, the bank had knowledge of Wayne's death as early as the day it assumed HNB's deposit obligations from the FDIC – May 31, 1990. NationsBank contends that it did not have knowledge of Wayne's death until up to two months later. Because of this conflicting evidence, we cannot say that this issue was conclusively established so as to support a directed verdict against Lillian.

Lillian's fourth and fifth points of error are sustained.

Conversion of Funds on Deposit

In her second and third points of error, Lillian argues that the trial court erred in granting NationsBank's motion for directed verdict on her conversion claims. In her eighth point of error, Lillian contends that the trial court erred in denying her motion for directed verdict on the same claims. We address these points together.

Money may properly be the subject of an action for conversion only if the funds sought can be described or identified as a specific chattel. *Upper Valley Aviation v. Mercantile Nat'l Bank*, 656 S.W.2d 952, 955 (Tex. App. – Dallas 1983, writ ref'd n.r.e.); *First Nat'l Bank v. Hubbs*, 566 S.W.2d 375, 377 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ); *see Houston Nat'l Bank v. Biver*, 613 S.W.2d 771, 774 (Tex. Civ. App. – Houston [1st Dist.] 1981, writ ref'd n.r.e.). When an indebtedness[4] can be discharged by payment of a fungible sum of money, an action in conversion is inappropriate to enforce the debt. *Hubbs*, 566 S.W.2d at 377.

Lillian relies on *Houston National Bank v. Biber* for the proposition that a bank can be held liable for conversion of a specific, identifiable chattel in the everyday instance where a customer deposits a check into his checking account. Her reliance is misplaced. In *Biber*, the bank customer engaged his bank to keep safe a cashier's check made payable to a to-be-formed partnership. The check

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[4] "A fund which is placed on deposit with a bank ordinarily becomes a general deposit, creating a debtor/creditor relationship between the bank and the depositor." *Hubbs*, 566 S.W.2d at 377.

was not deposited into the customer's account; rather, the check itself was placed in the customer's file at the bank. The court of appeals characterized the arrangement as a bailment contract or a "safe-keeping role." *Biber*, 613 S.W.2d at 775. Because the nature of the arrangement in *Biber* called for the return of a specific, identifiable chattel – the cashier's check – the bank was liable for conversion when it refused to return the check to its customer. *Id.*

This case is not *Biber*. There is no evidence that Lillian sought – nor does she now seek – the return of a specific, identifiable chattel. Rather, she seeks the *value* of deposited funds. Conversion is not a proper action under which to seek that remedy. *Hubbs*, 566 S.W.2d at 377.

Lillian's second, third and eighth points of error are overruled.

Set-off Against Social Security Benefits on Deposit

In point of error nine, Lillian argues the trial court erred in ruling that NationsBank properly exercised a set-off against the social security benefits in her account. Lillian bases her argument on the spendthrift provision of the Social Security Act –

> The right of any person to any future payment under this title . . . shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title . . . shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a) (1988).

Two reported cases addressed the specific issue of whether a bank can set-off against a customer's account into which social security benefits have been deposited. Both held that the bank's set-off did not violate section 407(a) because set-off is not a "legal process." *Frazier v. Marine Midland Bank*, 702 F. Supp. 1000, 1003 (W.D.N.Y. 1988); *Gillespie v. Cherry Creek Nat'l Bank*, 41 B.R. 810, 812 (Bankr. D. Colo. 1984); *see also Banco Central de Reserva v. Riggs Nat'l Bank*, 919 F. Supp. 13, 17 (D.D.C. 1994) (citing *Frazier* and concluding that, under a similar spendthrift provision of the Federal Sovereign Immunities Act, the legal processes of "[a]ttachment and execution are fundamentally different from set-off"). In *Gillespie*, the court stated that "set-off is a self-help procedure . . . not a legal process" and "social security benefits are not exempt from its reach." *Gillespie*, 41 B.R. at 812.

We agree that set-off is a self-help remedy. Therefore, a bank's use of its contractual set-off procedure to settle a depositor's obligation to the bank is not the type of "legal process" contemplated by section 407(a). *Frazier*, 702 F. Supp. at 1003.

Lillian's ninth point of error is overruled.

Credit Life Insurance

In point of error six, Lillian contends the trial court erred in granting a directed verdict in favor of NationsBank on her breach of contract claim based on NationsBank's refusal to pay credit life insurance benefits following Wayne's death. In her seventh point of error, Lillian complains that the trial court further erred in granting a directed verdict in favor of NationsBank on

her DTPA claim based on the same credit life insurance. We disagree.

Wayne and Lillian took out loans from HNB in 1989 and in 1990. On both occasions, they purchased credit life insurance to satisfy the loan balance in the event of Wayne's death. The credit life insurance was provided by Navton, and it was Navton who sought to void the credit life insurance policy. There is no evidence in this record that Navton had any connection with NationsBank. Therefore, there could be no breach of contract between NationsBank and the Derryberrys. Not being a party to the contract, NationsBank could not have breached the contract. *See Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 698 (Tex. 1994); *see also Northwest Bank v. Garrison*, 874 S.W.2d 278, 280 (Tex. App. – Houston [1st Dist.] 1994, no writ).

We overrule Lillian's sixth point of error.

As to Lillian's DTPA claim, we again note that it was Navton – not NationsBank – who sought to void the credit life insurance policy because of misrepresentations regarding Wayne's health. In short, Lillian simply asserts this claim against the wrong party.

We overrule Lillian's seventh point of error.

Having sustained Lillian's fourth and fifth points of error as to the contract cause of action, we reverse that portion of the judgment of the trial court and remand this

case. The remaining portions of the judgment are affirmed.

/s/ D. Camille Hutson-Dunn
D. Camille Hutson-Dunn[5]
Justice

Justices Wilson and Andell also sitting.

Justice Wilson dissenting.

Do not publish, TEX. R. APP. P. 47

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[5] The Honorable D. Camille Hutson-Dunn, retired Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

[SEAL]
In The
Court of Appeals
For the
First District of Texas

NO. 01-95-01438-CV

LILLIAN C. DERRYBERRY,
individually and as next friend of
JAMES L. BRYANT, Appellants

V.

NATIONSBANK OF TEXAS, N.A.,
formerly known as N.C.N.B. Texas
National Bank Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 17,834

DISSENTING OPINION

I respectfully dissent. I would deny all points of error asserted by appellant and affirm the trial court's judgment.

I would argue the majority's finding in point of error five that a fact issue is created over the issue of when NationsBank knew of Mr. Derryberry's death is of no consequence in this case. I find no authority that Mrs. Derryberry has a private cause of action arising from the federal statute that potentially makes the bank liable

based upon its alleged knowledge of Mr. Derryberry's death.

/s/ Davie L. Wilson
Davie L. Wilson
Justice

Justices Andell and Hutson-Dunn[1] also sitting.

Do not publish, TEX. R. APP. P. 47.

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[1] The Honorable D. Camille Hutson-Dunn, retired Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

[SEAL]
Court of Appeals
First District of Texas
JUDGMENT

LILLIAN C. DERRYBERRY, INDIVIDUALLY AND AS NEXT FRIEND OF JAMES L. BRYANT, APPELLANTS

NO. 01-95-01438-CV

V.

NATIONSBANK OF TEXAS, N.A., APPELLEE

Appeal from 12th District Court of Walker County, Texas (Tr. Ct. No. 17,834) Opinion delivered by Justice Hutson-Dunn, Justices Wilson and Andell also sitting. Justice Wilson dissenting.

The Court today considered the appellee's motion for rehearing, and the same has been duly considered and found without merit. It is therefore ordered that said motion be denied. However, this Court's former judgment of October 30, 1997, of record in Minute Book vol. 32, page 2459, be, and the same hereby is, **VACATED, SET ASIDE, AND ANNULLED.** It is further **ORDERED** that this Court's opinion be withdrawn.

The cause heard today by the Court is an appeal from the judgment signed by the court below on September 28, 1995. After submitting the cause and inspecting the record of the court below, it is the opinion of this Court that there was reversible error in the judgment. It is therefore **CONSIDERED, ADJUDGED,** and **ORDERED** that the judgment of the court below be **reversed** on the

contract cause of action of Lillian C. Derryberry, and this cause of action be **remanded** to the trial court.

It is further the opinion of this Court that there was no reversible error in the remainder of the judgment. It is therefore **CONSIDERED, ADJUDGED**, AND **ORDERED** that the judgment of the court below, except as hereinabove reversed, be **affirmed**.

It is further **ORDERED** that the appellee, NATIONSBANK OF TEXAS, N.A., and the appellant, Lillian C. Derryberry, share equally the costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Wilson, Andell, and Hutson-Dunn.

Judgment rendered Mar. 5, 1998.

APPENDIX B

Order of Texas Supreme Court denying
Petition for Review. 8-25-98

[SEAL]

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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August 25, 1998

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RE: Case Number 98-0353
Court of Appeals Number: 01-95-01438-CV
Trial Court Number: 17,834

Style: LILLIAN C. DERRYBERRY, individually, and a/n/f of JAMES L. BRYANT
v.
NATIONSBANK OF TEXAS, N.A.

Dear Counsel:

Today, the Supreme Court of Texas denied both petitions for review in the above numbered and styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

cc: The Honorable Olen Underwood
Ms. Margie Thompson, Clerk
Ms. Bernice Coleman

APPENDIX C

Texas First Court of Appeals Original Opinion and Judgment which was withdrawn. 10-30-97.

Opinion issued October 30, 1997.

[SEAL]

In the

Court of Appeals

For The

First District of Texas

NO. 01-95-01438-CV

LILLIAN C. DERRYBERRY,
individually and as next friend of
JAMES L. BRYANT, Appellants

V.

NATIONSBANK OF TEXAS, N.A.,
formerly known as N.C.N.B. TEXAS
NATIONAL BANK, Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 17,834

OPINION

Appellant Lillian Derryberry, sued Nationsbank for breach of contract, conversion, and violations of the Texas Deceptive Trade Practices Act (DTPA). The trial court granted NationsBank's motions for directed verdict on each of Lillian's claims. We affirm in part and reverse in part and remand.

BACKGROUND

Wayne and Lillian Derryberry opened a checking account with Huntsville National Bank (HNB) in 1985. Wayne was a veteran of the armed forces and received disability benefits from the Veterans Administration (VA). Those periodic benefits were electronically deposited directly into the Derryberry's account at HNB.

Wayne died on April 19, 1990. Despite the fact that Lillian informed the VA of Wayne's death, the U.S. Treasury continued the regular deposits of veteran's benefits into Lillian's account at HNB. The bank continued accepting those deposits. Following Wayne's death, Lillian applied for survivor benefits from the Social Security Administration (SSA) for herself and her biological grandson/adopted son, James Bryant. The SSA began electronically depositing benefits of $386.00 per person directly into Lillian's account at HNB.

On May 31, 1990, HNB failed and was taken over by the Federal Deposit Insurance Corporation (FDIC). The operations and deposit liabilities of HNB were assumed by another bank – NCNB, now NationsBank. There were few visible changes at the bank as a result of this transaction. Most of the HNB employees remained in their same positions and became employees of NationsBank.

In July, 1990, the VA notified NationsBank that it would be seeking reclamation of the benefits paid into Lillian's account since the death of Wayne. In late July, NationsBank froze Lillian's account to ensure that there were enough funds to satisfy the reclamation claim. On August 3, 1990, NationsBank received the VA's formal "Notice of Reclamation" demanding the return of

$2,502.00 – the sum of the three monthly benefit deposits made since Wayne's death. Following this demand from the VA, the bank set-off the $1,712.97 balance in Lillian's account against the amount owed to the VA; NationsBank then remitted the $1,712.97 to the VA and mailed a notice of the reclamation to Lillian.

Some of the funds remaining in Lillian's account at the time of the set-off were Social Security benefits for Lillian and her grandson, James Bryant, which had been electronically deposited. NationsBank did not know that any of the social security benefits deposited into Lillian's account were for James.

Facts Specific to the Credit Life Insurance

Wayne and Lillian took out a loan from HNB in 1989. In conjunction with that loan, the couple purchased credit life insurance to pay off the loan balance in the event of Wayne's death; that insurance was provided by Navton Life Insurance Co. (Navton). Navton is, it appears, an entity separate and distinct from the bank; there is no indication that Navton was merely a label under which the bank marketed its own insurance. Attached to the insurance application was an unsigned "Certificate of Good Health." Lillian testified that Wayne was not in good health and had never tried to hide that fact from the bank. The Derryberrys had always purchased credit life insurance on previous loans from HNB, and Wayne had never signed a certificate of good health for those policies.

The 1989 promissory note was refinanced on April 6, 1990 (the April 6 note). Lillian executed the April 6 note

on that date; Wayne went to the bank a few days later to sign the note. In conjunction with the April 6 note, Lillian and Wayne purchased credit life insurance and paid the $73.08 premium. Attached to the April 6 note is certificate of good health signed by Wayne. There is considerable dispute regarding whether Wayne knowingly signed the certificate – Lillian contends that Wayne would not have tried to deceive the bank about his poor health.

Lillian sued NationsBank for breach of contract, conversion, and violations of the DTPA. The trial court granted NationsBank's motions for directed verdict on each of Lillian's claims.

DISCUSSION

In nine points of error, Lillian argues that the trial court erred in granting NationsBank's motion for directed verdict and in denying her own motion for directed verdict. Lillian's contentions can be summarized in four points – the trial court erred by not holding that: (1) NationsBank is liable for conversion of Lillian's funds on deposit (points of error 2, 3, and 8); (2) social security benefits are protected against set-off (point 9); (3) NationsBank breached its contract with Lillian by refusing to pay funds on deposit in Lillian's account upon her demand (points 4 and 5); and (4) NationsBank breached its contract with Lillian and violated the Texas Deceptive Trade Practices Act by refusing to pay credit life insurance benefits upon the death of her husband (points six and seven).[1]

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[1] Lillian's first point of error is merely an omnibus contention that the trial court erred in granting a judgment

Standard of Review

A directed verdict is proper when the evidence conclusively proves a fact that establishes the movant's right to judgment as a matter of law, or negates the right of the non-movant to judgment; or the evidence offered is insufficient to raise a fact issue on the cause of action at issue. *Metzger v. Sebek*, 892 S.W.2d 20, 40 (Tex. App. – Houston [1st Dist.] 1994, writ denied). The trial court should not weigh the credibility of the witnesses in determining whether a directed verdict is warranted. *Id.*

In reviewing the granting of an instructed verdict, we must determine whether there is any evidence of probative force to raise fact issues on the material questions presented. *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 ((Tex. 1994); *Metzger*, 892 S.W.2d at 41. We consider all the evidence in a light most favorable to the party against whom the verdict was instructed and disregard all contrary evidence and inferences; we give the losing party the benefit of all reasonable inferences created by the evidence. *Szczepanik*, 883 S.W.2d at 649; *Metzger*, 892 S.W.2d at 40.

In reviewing the denial of an instructed verdict, we consider all the evidence in the light most favorable to the nonmovant and disregard all evidence to the contrary. *Harris County v. Demny*, 886 S.W.2d 330, 333 (Tex. App. – Houston [1st Dist.] 1994, writ denied). Every reasonable

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against her. In her first point, Lillian neither cites any authority nor makes any specific arguments. Accordingly, we disregard Lillian's first point of error as multifarious. *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 570 (Tex. App. – Houston [1st Dist.] 1996, no writ).

inference is resolved in favor of the nonmovant. *Id.* If there is any conflicting evidence of probative value on any theory of recovery, the issue must go to the jury. *Id.*

Payment on Demand

In points of error four and five, Lillian argues the trial court's granting of NationsBank's motion for directed verdict was in error because NationsBank breached its contract with Lillian by freezing her account and refusing to pay on demand the funds deposited in her account.

NationsBank froze Lillian's account and used the funds on deposit to satisfy the bank's obligation to the U.S. Treasury for depositing Wayne's VA benefits after his death. Lillian argues that the federal regulations governing the direct deposit of VA benefits prevent NationsBank from marshalling the funds in her account for this purpose. Specifically, Lillian relies on the following statement: "The financial institution is not authorized by this part to debit the account of any party or to deposit any funds from any account in a suspense account or escrow account or the equivalent." 31 C.F.R. § 210.14(c)(1990). However, Lillian ignores the next sentence in the same regulation: "If such action is taken, it must be under authority of State law or the financial institution's contract with its depositor(s)." *Id.*

Here, the deposit agreement executed by Wayne and Lillian when they established their NationsBank account provided, in part, as follows –

> If, in connection with a direct deposit plan, we [NationsBank] deposit any amount in this

> account which should have been returned to the Federal Government for any reason, you authorize us to deduct the amount of our liability to the Federal Government from this account or from any other account you have with us without prior notice and at any time, except as prohibited by law. We may also use any other legal remedy to recover the amount of our liability.

Therefore, NationsBank had a contractual right to use the funds in Lillian's account to satisfy its obligation to the U.S. Treasury for accepting deposit of posthumous VA benefits for Wayne.

To the extent that NationsBank had a contractual right to freeze the funds in Lillian's account and apply those funds to satisfy its obligation to the Treasury, Lillian argues that NationsBank exceeded the scope of that contractual right. She posits that the contractual rights of NationsBank entitled it to satisfaction out of Lillian's account only so long as NationsBank was not acting "wrongfully." Lillian contends that NationsBank acted wrongfully in two ways: (1) by continuing to accept VA deposits even after it knew of Wayne's death, and (2) by seizing funds from Lillian's account after she applied for a waiver from the VA which would have absolved the bank from liability for the overpayments.

Addressing her application for a reimbursement waiver, we note that there is no evidence in the record that Treasury had granted Lillian's waiver application, but Lillian testified that she notified the bank that she was seeking a waiver of reimbursement from the VA. On appeal, however, Lillian fails to cite – and our research did not reveal – a single authority indicating that

NationsBank's exercise of its contractual rights under the deposit agreement were somehow "wrongful" once it knew that Lillian was seeking a waiver from the VA. Therefore, even if there was a fact issue as to whether NationsBank knew of Lillian's pending attempt to obtain a waiver, there is no indication that such a factual inquiry was legally material.

Lillian also argues that NationsBank continued accepting Wayne's VA benefits for deposit even after it knew of his death. She contends that, once NationsBank had knowledge of Wayne's death, it could no longer rely on the deposit agreement to authorize use of Lillian's funds to satisfy the Bank's obligation to Treasury. Lillian's argument is akin to the doctrine of mitigation of damages. *See, e.g., Great Am. Ins. Co. v. North Austin Mun. Util. Dist.*, 908 S.W.2d 415, 426 (Tex. 1995) ("Where a party is entitled to the benefits of a contract and can save himself from the damages resulting from its breach . . . with reasonable exertions, it is his duty to . . . make such exertions."). Lillian contends that NationsBank could have minimized its obligation to Treasury – and, thereby, her contractual obligation to the bank – by telling the VA of Wayne's death. If that is the case, then determining when NationsBank knew of Wayne's death would be a material question of fact.

Lillian argues that NationsBank knew of Wayne's death on May 17, 1990 – the day Lillian and Gay Clements, a HNB employee, signed Lillian's application for benefits under Wayne's credit life insurance policy. NationsBank counters that it did not know of Wayne's death until "sometime in July of 1990," when it learned

that a Notice of Reclamation was forthcoming from the VA.

HNB failed on May 31, 1990, and was taken over by the FDIC. The record reflects that NCNB, now NationsBank, assumed the deposit liabilities of HNB from the FDIC on that same day. NationsBank now argues that it cannot be charged with knowledge of Wayne's death on May 17, 1990, because Gay Clements was an employee of HNB at the time. NationsBank contends that it cannot be charged with Clements's knowledge of Wayne's death because, at the time Clements obtained that knowledge, she was an employee of HNB, not NationsBank. NationsBank contends that Clements's knowledge cannot be imputed to a successor entity.

Lillian cites no authority that would charge NationsBank with Clements's knowledge on a successor entity theory. Lillian does, however, argue that, because Clements's had knowledge of Wayne's death and Clements was an employee of NationsBank, it makes no difference that Clements learned of Wayne's death while she was employed by HNB. We agree. In *Fireman's Fund Indem. Co. v. Boyle Gen. Tire Co.*, 392 S.W.2d 352 (Tex. 1965), the Texas Supreme Court stated that " 'the 7time, [sic] place, or manner in which knowledge is acquired by a servant or other agent is immaterial in determining the liability of his principal because of it.' " *Id.* at 356 (quoting RESTATEMENT (Second) AGENCY, § 276, cmt. A (1958)); *see Wellington Oil Co. v. Maffi*, 150 S.W.2d 60, 63 (Tex. 1941) ("Relevant knowledge may have been acquired by the agent before the time of his employment or after he becomes agent, either while acting for himself or for the principal.").

There is conflicting evidence regarding when NationsBank knew of Wayne's death. Lillian argues, that, through Clements, the bank had knowledge of Wayne's death as early as the day it assumed HNB's deposit obligations from the FDIC – May 31, 1990. NationsBank contends that it did not have knowledge of Wayne's death until up to two months later. Because of this conflicting evidence, we cannot say that this issue was conclusively established so as to support a directed verdict against Lillian.

Lillian's fourth and fifth points of error is sustained.

Conversion of Funds on Deposit

In her second and third points of error, Lillian argues that the trial court erred in granting NationsBank's motion for directed verdict on her conversation claims. In her eighth point of error, Lillian contends that the trial court erred in denying her motion for directed verdict on the same claims. We address these points together.

Money may properly be the subject of an action for conversion only if the funds sought can be described or identified as a specific chattel. *Upper Valley Aviation v. Mercantile Nat'l Bank,* 656 S.W.2d 952, 955 (Tex. App. – Dallas 1983, writ ref'd n.r.e.); *First Nat'l Bank v. Hubbs,* 566 S.W.2d 375, 377 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ); *see Houston Nat'l Bank v. Biber,* 613 S.W.2d 771, 774 (Tex. Civ. App. – Houston [1st Dist.] 1981, writ ref'd

n.r.e.). When an indebtedness[2] can be discharged by payment of a fungible sum of money, an action in conversion is inappropriate to enforce the debt. *Hubbs*, 566 S.W.2d at 377.

Lillian relies on *Houston National Bank v. Biber* for the proposition that a bank can be held liable for conversion of a specific, identifiable chattel in the everyday instance where a customer deposits a check into his checking account. Her reliance is misplaced. In *Biber*, the bank customer engaged his bank to keep safe a cashier's check made payable to a to-be-formed partnership. The check was not deposited into the customer's account, rather, the check itself was placed in the customer's file at the bank. The court of appeals characterized the arrangement as a bailment contract or a "safe-keeping role." *Biber*, 613 S.W.2d at 775. Because the nature of the arrangement in *Biber* called for the return of a specific identifiable chattel – the cashier's check – the bank was liable for conversion when it refused to return the check to the customer.

This case is not *Biber*. There is no evidence that Lillian sought – nor does she now seek – the return of a specific, identifiable chattel. Rather, she seeks the *value* of deposited funds. Conversion is not a proper action under which to seek that remedy. *Hubbs*, 566 S.W.2d at 377.

Lillian's second, third and eight points of error are overruled.

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[2] "A fund which is placed on deposit with a bank ordinarily becomes a general deposit, creating a debtor/creditor relationship between the bank and the depositor." *Hubbs*, 566 S.W.2d at 377.

Set-off Against Social Security Benefits on Deposit

In point of error nine, Lillian argues the trial court erred in ruling that NationsBank properly exercised a set-off against the social security benefits in her account. Lillian bases her argument on the spendthrift provision of the Social Security Act –

> The right of any person to any future payment under this title . . . shall not be transferable or assignable, at law or in equity, and none of the money's paid or payable or rights existing under this title . . . shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a) (1988).

Two reported cases addressed the specific issue of whether a bank can set-off against a customer's account into which social security benefits have been deposited. Both held that the banks' set-off did not violate section 407(a) because set-off is not a "legal process." *Frazier v. Marine Midland Bank*, 702 F. Supp. 1000, 1003 (W.D.N.Y. 1988). *Gillespie v. Cherry Creek Nat'l Bank*, 41 B.R. 810, 812 (Bankr. D. Colo. 1984); *See also Banco Central de Reserva v. Riggs Nat'l Bank*, 919 F. Supp. 13, 17 (D.D.C. 1994) (citing *Frazier* and concluding that, under a similar spendthrift provision of the Federal Sovereign Immunities Act, the legal processes of "[a]ttachment and execution are fundamentally different from set-off"). In *Gillespie*, the court stated that "set-off is a self-help procedure . . . not a legal process" and "social security benefits are not exempt from its reach." *Gillespie*, 41 B.R. at 812.

We agree that set-off is a self-help remedy. Therefore, a bank's use of its contractual set-off procedure to settle a depositor's obligation to the bank is not the type of "legal process" contemplated by section 407(a). *Frazier*, 702 F. Supp. at 1003.

Lillian's ninth point of error is overruled.

Credit Life Insurance

In point of error six, Lillian contends the trial erred in granting a directed verdict in favor of NationsBank on her breach of contract claim based on NationsBank's refusal to pay credit life insurance benefits following Wayne's death. In her seventh point of error, Lillian complains that the trial court further erred in granting a directed verdict in favor of NationsBank on her DTPA claim based on the same credit life insurance. We disagree.

Wayne and Lillian took out loans from HNB in 1989 and in 1990. On both occasions, they purchased credit life insurance to satisfy the loan balance in the event of Wayne's death. The credit life insurance was provided by Navton, and it was Navton who sought to void the credit life insurance policy. There is no evidence in this record the Navton had any connection with NationsBank. Therefore, there could be no breach of contract between NationsBank and the Derryberrys. Not being a party to the contract, NationsBank could not have breached the contract. *See Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 698 (Tex. 1994); *see also Northwest Bank v. Garrison*, 874 S.W.2d 278, 280 (Tex. App. – Houston [1st Dist.] 1994, no writ).

We overrule Lillian's sixth point of error.

As to Lillian's DTPA claim, we again note that it was Navton – not NationsBank – who sought to void the credit life insurance policy because of misrepresentations regarding Wayne's health. In short, Lillian simply asserts this claim against the wrong party.

We overrule Lillian's seventh point of error.

Having sustained Lillian's fourth and fifth points of error as to the contract cause of action, we reverse that portion of the judgment of the trial court and remand this case. The remaining portions of the judgment are affirmed.

/s/ D. Camille Hutson-Dunn
D. Camille Hutson-Dunn[3]
Justice

Justices Wilson and Andell also sitting.

Justice Wilson dissenting.

Do not publish. TEX. R. APP. P. 47.

Judgments rendered and opinion delivered Oct. 30, 1997
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

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[3] The Honorable D. Camille Hutson-Dunn, retired Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

[SEAL]
In The
Court of Appeals
For the
First District of Texas

NO. 01-95-01438-CV

LILLIAN C. DERRYBERRY,
individually and as next friend of
JAMES L. BRYANT, Appellants

V.

NATIONSBANK OF TEXAS, N.A.,
formerly known as N.C.N.B. Texas
National Bank Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 17,834

DISSENTING OPINION

I respectfully dissent. I would deny all points of error asserted by appellant and affirm the trial court's judgment.

I would argue the majority's finding in point of error five that a fact issue is created over the issue of when NationsBank knew of Mr. Derryberry's death is of no consequence in this case. I find no authority that Mrs. Derryberry has a private cause of action arising from the

federal statute that potentially makes the bank liable based upon its knowledge of Mr. Derryberry's death.

/s/ Davie L. Wilson
Davie L. Wilson
Justice

Justices Andell and Hutson-Dunn[1] also sitting.

Do not publish. TEX. R. APP. P. 47.

Judgment rendered and opinion delivered Oct 30 1997.

True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

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[1] The Honorable D. Camille Hutson-Dunn, retired Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

[SEAL]
Court of Appeals
First District of Texas
JUDGMENT

LILLIAN C. DERRYBERRY, individually and as next friend of JAMES L. BRYANT, APPELLANTS

NO 01-95-01438-CV

V.

NATIONSBANK OF TEXAS, N.A., APPELLEE

Appeal from 12th District Court of Walker County, Texas (Tr. Ct. No. 17,834) Opinion delivered by Justice Dunn, Justices Wilson and Andell also sitting. Justice Wilson dissenting.

The cause heard today by the Court is an appeal from the judgment signed by the court below on September 28, 1995. After submitting the cause and inspecting the record of the court below, it is the opinion of this Court that there was reversible error in the judgment. It is therefore **CONSIDERED, ADJUDGED**, and **ORDERED** that the judgment of the court below be **reversed** on the contract cause of action of Lillian C. Derryberry, and this cause of action be **remanded** to the trial court.

It is further the opinion of this Court that there was no reversible error in the judgment, except as herein reversed. It is therefore **CONSIDERED, ADJUDGED**, and **ORDERED** that the judgment of the court below, except as hereinabove reversed, be **affirmed**.

It is further **ORDERED** that the appellee, NATIONSBANK OF TEXAS, N.A., and the appellant, Lillian C.

Derryberry, evenly split all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Wilson, Andell, and Hutson-Dunn.

Judgment rendered Oct. 30, 1997.

APPENDIX D

Final Judgment by the trial court. 9-28-95

D-1

No. 17,834

LILLIAN C. DERRYBERRY, Individually, And As Next Friend For JAMES L. BRYAN	§	IN THE DISTRICT COURT OF
v.	§	WALKER COUNTY, TEXAS
THE NATIONS BANK, FORMERLY KNOWN AS N.C.N.B. TEXAS NATIONAL BANK	§	12TH JUDICIAL DISTRICT

FINAL JUDGMENT

(Filed Sept. 29, 1995)

On Wednesday, September 6, 1995, came on to be heard the above-referenced cause for trial. Plaintiffs, Lillian C. Derryberry, Individually and as Next Friend for James L. Bryan (the "Plaintiffs") appeared and announced ready for trial by and through their attorneys of record, Robert L. Wharton and Brenda G. Willett. Defendant, NationsBank of Texas, N.A., formerly known as NCNB Texas National Bank (the "Defendant") appeared and announced ready for trial by and through its attorneys of record, Eric Lipper and Jeffrey Brookner.

A jury of twelve qualified jurors was empaneled and an oath administered to the panel. The case proceeded with the introduction of evidence and the taking of testimony by the Plaintiffs and the Defendant. Each party rested their respective cases on Thursday, September 7, 1995.

At the close of the evidence, Defendant, NationsBank of Texas, N.A., formerly known as NCNB Texas National Bank made a Motion for Directed Verdict on all of the claims asserted by Plaintiffs Lillian C. Derryberry, Individually and as Next Friend for James L. Bryan. The Court considered the arguments of counsel and the briefs filed in this cause and found the motion of Defendant NationsBank of Texas, N.A., formerly known as NCNB Texas National Bank to be well-taken.

At the close of the evidence, Plaintiffs made a Motion for Directed Verdict on all counterclaims asserted by Defendant, and Defendant thereupon announced Defendant's withdrawal of counterclaims and request for attorney's fees. Further, Plaintiffs made a Motion for Directed Verdict in their favor against Defendant on Plaintiffs' conversion claim.

Accordingly, IT IS ORDERED that Plaintiffs, Lillian C. Derryberry, Individually and as Next Friend for James L. Bryan shall take nothing on their claims against Defendant, NationsBank of Texas, N.A., formerly known as NCNB Texas National Bank.

All relief not expressly granted herein is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs in this matter are taxed against the party incurring the same.

SIGNED this the 28th day of September, 1995.

/s/ Wm L McAdams
JUDGE PRESIDING

APPENDIX E

42 U.S.C. § 407

Protection of Social Security Benefits

42 U.S.C. § 407. Assignment; amendment of section

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

APPENDIX F

U.S. Constitution art. VI, Cl.2

Supremacy Clause

U.S. Constitution Art. VI

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX G

38 U.S.C. § 5302

Waiver of Veteran's Overpayments

38 U.S.C. § 5302. Waiver of recovery of claims by the United States

(a) There shall be no recovery of payments or overpayments (or any interest thereon) of any benefits under any of the laws administered by the Secretary whenever the Secretary determines that recovery would be against equity and good conscience, if an application for relief is made within 180 days from the date of notification of the indebtedness by the Secretary to the payee,

APPENDIX H

31 U.S.C. § 3332

Required Direct-Deposit

31 U.S.C. § 3332. Required direct deposit

* * *

(f)(1) Notwithstanding any other provision of law (including subsections (a) through (e) of this section and sections 5120(a) and (d) of title 38), except as provided in paragraph (2) all Federal payments made after January 1, 1999, shall be made by electronic funds transfer.

(2)(A) The Secretary of the Treasury may waive application of this subsection to payments –

(i) for individuals or classes of individuals for whom compliance imposes a hardship;

(ii) for classifications or types of checks; or

(iii) in other circumstances as may be necessary.

* * *

(j) For purposes of this section –

(1) The term "electronic funds transfer" means any transfer of funds, other than a transaction originated by cash, check, or similar paper instrument, that is initiated through an electronic terminal, telephone, computer, or magnetic tape, for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account. The term includes Automated Clearing House transfers, Fed Wire transfers, transfers made at automatic teller machines, and point-of-sale terminals.

(2) The term "Federal agency" means –

(A) an agency (as defined in section 101 of this title); and

(B) a Government corporation (as defined in section 103 of title 5).

(3) The term "Federal payments" includes –

(A) Federal wage, salary, and retirement payments;

(B) vendor and expense reimbursement payments; and

(C) benefit payments.

Such term shall not include any payment under the Internal Revenue Code of 1986.

* * *

APPENDIX I

Plaintiff's First Amended complaint. 3-10-94
Portions on 42 U.S.C. § 407 claim.

No. 17,834

LILLIAN C. DERRYBERRY, INDIVIDUALLY AND AS NEXT FRIEND FOR JAMES L. BRYAN	§	IN THE DISTRICT COURT OF
V.	§	WALKER COUNTY, TEXAS
THE NATIONS BANK, FORMERLY KNOWN AS N.C.N.B. TEXAS NATIONAL BANK	§	12TH JUDICIAL DISTRICT

PLAINTIFFS' FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW LILLIAN C. DERRYBERRY and JAMES L. BRYAN, Plaintiffs in the above-styled and numbered cause, and file this First Amended Petition complaining of the NATIONS BANK, formerly known as N.C.N.B. TEXAS NATIONAL BANK, Defendant, and for cause of action would respectfully show this Honorable Court as follows:

I.

Parties

Plaintiff LILLIAN C. DERRYBERRY (hereinafter "DERRYBERRY") is an individual who resides in Point Blank, San Jacinto County, Texas.

II.

Plaintiff JAMES L. BRYAN (hereinafter "BRYAN") is the minor grandson of Plaintiff LILLIAN C. DERRYBERRY and is her dependent. BRYAN has resided with LILLIAN C. DERRYBERRY at all times relevant to this lawsuit.

* * *

X.

In May of 1990, Plaintiff DERRYBERRY became eligible to receive Old-Age, Survivors, and Disability Insurance Benefits (OASDI) under Title II of the Social Security Act, 42 U.S.C. § 401 et seq. DERRYBERRY was entitled to receive $386.00 per month in her own behalf, which she arranged to have directly deposited into her checking account. Plaintiff BRYAN was similarly entitled to receive OASDI benefits from the Social Security Administration. Plaintiff DERRYBERRY also arranged for this additional $386.00 per month to be directly deposited into her checking account.

XI.

On or about July 12, 1990, NATIONS BANK froze DERRYBERRY'S checking account and refused her access to all funds, including Social Security funds, contained in her account. The Defendant immediately began dishonoring checks drawn by DERRYBERRY against her account, and returned such checks to her creditors on the alleged grounds of "Not Sufficient Funds," when in fact such funds were in her account.

XII.

In August of 1990, Social Security benefits for DERRYBERRY and BRYAN were directly deposited in to DERRYBERRY's checking account with Defendant. Although the Defendant had actual knowledge that these direct deposits were received from the Social Security Administration, the Defendant nevertheless continued to maintain a hold on DERRYBERRY's checking account, and denied her access to all of the Social Security funds.

XIII.

The Defendant subsequently invaded DERRYBERRY's checking account and sent $1,712.97 to the Veterans Administration, which was $6.01 more than Plaintiff had in her account at the time. The funds taken from DERRYBERRY'S checking account included the Social Security benefits which had been direct deposited on behalf of DERRYBERRY and BRYAN. The NATIONS BANK took such action without DERRYBERRY's desire, consent or authorization, and in spite of her pleas to the contrary. The Defendant then began dunning DERRYBERRY for the alleged "overdraft" of $6.01.

* * *

XX.

Defendant wrongfully withheld and exercised control, to Plaintiffs' detriment, over OASDI benefits which were held in DERRYBERRY's checking account. The NATIONS BANK subsequently made an authorized disbursement of such funds to the Veterans Administration without any lawful authority to do so, and in violation of

42 U.S.C. § 407. Defendant should therefore be held liable for the conversion of such funds.

* * *

APPENDIX J

Trial Court Transcript. 9-7-95.
Argument on 42 U.S.C. § 407 claim.

No. 17,834

LILLIAN C. DERRYBERRY, Individually, And As Next Friend For JAMES L. BRYAN	*	IN THE DISTRICT COURT OF
VS.	*	WALKER COUNTY, TEXAS
THE NATIONS BANK, Formerly Known as NCNB TEXAS NATIONAL BANK	*	12TH JUDICIAL DISTRICT

* * * * * * * * * * * * * * * * *

BE IT REMEMBERED that on the 7th day of September, 1995, the above entitled and numbered cause came on for hearing before the Honorable William L. McAdams, Judge of said Court in Huntsville, Walker County, Texas, whereupon the proceedings contained herein were had.

* * * * * * * * * * * * * * * * *

APPEARANCES:

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-and-

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VOLUME II

* * *

[p. 300] MOTION FOR DIRECTED VIRDECT [sic]

BY MS. WILLETT:

Plaintiff moves for a directed verdict on the issue of conversion of the plaintiff's social security benefits in the amount of $772.00. Now, Federal Statute 42 U.S.C., Section 407 says that social security benefits cannot be subject to execution, levy, attachment, garnishment or other legal process.

The case law says – and primarily Shumate vs. NCNB, Nations Bank's precedessor [sic] – social security funds are protected even if they're co-mingled with other funds to the extent you can trace the money to social security benefits which were deposited. The rule you apply is first in and first out.

I think the evidence clearly shows when the social security benefits, the two checks for $386, when they went in and they never came out until the bank took them. So there's no question and there's no evidence to the contrary, you can clearly trace those social security benefits.

Shoemake [sic] also says if the recipient of social security benefits co-mingles benefits with other funds, they're still entitled to the protection of those funds if they're reasonably traceable social security benefits. They're protected even if they're [p. 301] co-mingled in a saving or checking account with funds from other sources.

Now as for the money other than the social security benefits, the veteran's benefits that were in there, Plaintiff Lillian Derryberry was not liable for the veterans benefits over payment. She wouldn't have had to repay it. She could have applied and received a waiver of those benefits if the government had sought to recover them from her.

Now there are CFR's that govern the disposition of veterans benefits and the recovery of them from the bank, and those federal regulations are in 31 CFR, Chapter 11, the 210 series. And it specifically says these regulations cover the reclamation of social security or Veterans Administration benefits which is exactly what's going on here.

And the relevant ones for this Court to consider – and these are in our jury instructions; you will find them. A financial institution shall be liable to the federal government for the total amount of all benefits received after

the death or legal incapacity of the recipient or the death of the beneficiary.

THE COURT: I'm sorry, read that again.

* * *

[p. 325] ever touched was the bank's common law right, itself. Therefore, there can be no finding of a violation of the social security exemption provision. And that trial brief I handed you a moment ago runs through all this in a little more detail.

MS. WILLETT: Your Honor, if I could hand you a copy of that federal statute. It's the same thing he gave you; I just circled that second part of it. What I think it says is that the the [sic] federal statute provision that protects social security benefits can't be limited, superseded, or otherwise modified under any other law unless it specifically –

THE COURT: Well, unless the cases under 407 say differently I would think that when they speak of execution, levy, attachment, garnishment, or other legal process, to me that means a third party coming in, someone that has a judgment against you whatever it might be, and not between the two parties, the first party and the second party. In this case the account holder and the bank where they have a contract between themselves.

MS. WILLETT: Your Honor, I didn't find any cases exactly on that point where the bank, itself, is taking the [p. 326] money. But I did find cases that talked about what is the purpose of that provision that protects social security benefits, and over and over and over again those cases say the purpose is to keep that pension

money available for the person's every day living expenses. And in all the cases I saw, to the extent that whatever process was being used to take that money away from them, took it away from them and made it not available to them for every day living expenses, it violated that provision.

THE COURT: But we're talking about the person had died and they're not entitled to the funds, and the government wanted their funds back and demanded them back.

MS. WILLETT: The government didn't ask for the social security benefits back. They didn't reclaim social security benefits. They just reclaimed the veterans benefits, and they held the social security benefits instead of that. The government didn't reclaim the social security benefits.

THE COURT: I may have misspoken myself. We have a specific reclamation of veterans benefits, but the law is the same, I think, on it. Isn't it?

[p. 327] MS. WILLETT: Yes, but there were no social security benefits reclaimed. And the Supreme Court decision Philpott vs. Essex County Welfare Board, in that case the State of Maryland had – New Jersey had attempted to take the beneficiary's social security benefits as reimbursement for some sort of public assistance they had paid out in the past. And as a condition of receiving a sistance a recipient is required by New Jersey law to e>ecute an agreement to reimburse the county Welfare Board for all payments received thereunder. So I don't think there's any question, but that the social security recipient in the Supreme Court case had probably signed

something similar to this agreement that said "I agree that you can take whatever money I have to pay this back."

But let me let you look at this Supreme Court decision. The Supreme Court said even with an agreement like that it doesn't allow – that will not allow the State of New Jersey to attach that money.

MR. BROOKNER: Your Honor, I'm pretty certain if that's the case that I found in my research that that does not apply to – it's not a set-off case. That's a direct levy case. Ms. Willett can correct me if I'm wrong.

[p. 328] THE COURT: There's no question the parties contracted between themselves that if the bank deposits an amount into the account which should have been returned to the government, which the veterans benefits should have been, then the bank can come back and deduct that from the account or any other account.

MS. WILLETT: Your Honor, we agree they had a common law right of set-off and they even had a contractual right of set-off. The question is did they have the right of set-off as to the social security benefits which were protected, and as to V.A. benefits or some other law saying they cannot take those V.A. benefits unless certain conditions are met. CFR says they can't.

THE COURT: Are you talking about 407?

MS. WILLETT: 407 is the social security provision, yes. It says they can't take the social security benefits.

MR. BROOKNER: Your Honor, If I can clear something up. I think what she's trying to say is that

when we returned the money she was talking about a few failures to comply with the provisions. She talked about the fact that [p. 329] we had knowledge of the death. And that's another case where I really think that Ms. Willett glossed over the language when she read you the statute. It states that a financial institution shall be deemed to have knowledge of the death or legal incapacity of the recipient or beneficiary when it is brought to the attention of a financial institution employee who handles benefits payments.

The testimony that you heard today was that the people who handle benefits payments worked upstairs. None of them came here to testify to that. Some of the witnesses said they knew a little about them and could interpret some of the documents, but the express testimony and the uncontroverted testimony was that the people who handled the benefits payments worked upstairs, so there's no evidence that any of them had knowledge. In fact, there's direct oral testimony that none of them did have knowledge of the death of the beneficiary until the point that the reclamation was received from the Veterans Administration.

This statute is specifically designed to protect a bank who in this case had only a few, but in some cases has thousands of branches and thousands of employees all over the State and can't be deemed to have knowledge just because one loan officer or one [p. 330] person who works for a loan officer in a branch has knowledge of the death. There was no failure to comply with the statute, Your Honor.

THE COURT: So exactly what are ya'll asking for with regard to your breach of contract claim with regard to the veterans benefits? Anything?

MS. WILLETT: We ask for the – It's not the veterans benefits we ask for. For breach of contract we ask for the money they took out of the bank. First of all, social security money and then the other money that was in there because they're relying on this reclamation procedure to say that gave them a right to take that account.

THE COURT: So it's ya'll's theory and you want to go to the jury on breach of contract that they had no right – that they had to send the money back to the Veterans Administration, but they did not have to send as much as they sent, and I assume that in sending as much as they sent they sent social security benefits and they're not protected under 407.

MS. WILLETT: That's true as to social security benefits. Now [p. 331] what he's talking about – The sections he's talking about about knowledge and when you send it back has to do with the bank limiting its liability. I don't think they can – They can limit their liability, but that's really not crucial to our claim.

This federal regulation, I don't think they can have an agreement that is in violation of the federal law and the federal law says – on the reclamation it says the financial institution is not authorized by this part to debit the account of any party or to deposit any funds from the account, the suspense account or any escrow account or the equivalent. And they did debit it, and this regulation says they couldn't do that.

THE COURT: Where are you reading from?

MR. BROOKNER: It's 210.12(c) of Title 31 of the Code of Federal Regulations.

THE COURT: And it says what?

MR. BROOKNER: It's the same language I read to you earlier. It's the top of the two highlighted paragraphs here, Your Honor.

[p. 332] THE COURT: Doesn't this specifically say that they can contract to do this?

MR. LIPPER: Yes, it does. Your Honor, there's also one more very important point on this and it's the reason we introduced Defendant's Exhibit No. 12. This is the check that the Huntsville National Bank drew to the Veterans Administration. It's a cashiers check. It's drawn on the Huntsville National Bank on its account. It's not drawn on the account of the Derryberrys because what actually happens here is really there are two things at work. First Huntsville goes to its main teller line. Ms. Fleming got the cashiers check, drew it on the bank, and the bank sends the money to the V.A. Then they exercise their contractual right of set-off which they are given to set-off against the account. There was no debiting of the account. They didn't go in with a withdrawal slip and draw a check on that account because that's not what happened. What happened was we drew a check on the bank, and the bank then exercised its right to set-off. No violation of any statute.

THE COURT: Refresh my memory as to how much – there was [p. 333] $1,712.97 left in the account?

MS. WILLETT: $1,706.00.

MR. LIPPER: We sent back $6.01 more than was actually in the account because the fee was dumped late that evening.

THE COURT: And the reclamation was for twenty-five what?

MR. LIPPER: $2,502.00, and I think on the top of that check –

THE COURT: And the way ya'll viewed it was that the account – there was $1,706.00 whatever it was –

MR. BROOKNER: Yes, Your Honor.

THE COURT: – of just debt money.

MR. LIPPER: Right mature money.

THE COURT: So ya'll sent, through ya'lls cashiers check, what ya'll believed was in the account; what ya'll believed could be offset.

* * *

[p. 337] back to your account and get it." That's a very equitable result. We're not making a dime off getting the reclamation.

MS. WILLETT: Your Honor, I don't dispute that they could have even a common law right of set-off as well as a contractual right of set-off, but I don't think that the right of set-off can supersede the federal statute that protects social security benefits.

THE COURT: The statute just talks about levy, execution, attachment, garnishment, and other legal process. This is a contractual process, not a legal process.

MS. WILLETT: And I believe the reclamation laws say that they cannot freeze the account. Ms. Gay Clements said they did freeze the account and then take the social security money which comes in later, almost a month later, and send it back in. That certainly violates the purpose –

THE COURT: Well, they didn't send it back to social security. They sent it –

MR. LIPPER: To the V.A., directly to the V.A.

* * *

APPENDIX K

Trial Court Transcript. 9-7-95
Trial Judge's comment on 42 U.S.C. § 407.

* * *

[p. 337] MS. WILLETT: Your Honor, I don't dispute that they could have even a common law right of set-off as well as a contractual right of set-off, but I don't think that the right of set-off can supersede the federal statute that protects social security benefits.

THE COURT: The statute just talks about levy, execution, attachment, garnishment,and other legal process. This is a contractual process, not a legal process.

* * *

APPENDIX L

Petitioner's Court of Appeals brief –
Points of Error and Argument on 42 U.S.C. § 407
and Supremacy Clause.

No. 01-95-01438-CV

In The

FIRST COURT OF APPEALS

Houston, Texas

LILLIAN C. DERRYBERRY,
Individually, and as Next Friend of
JAMES L. BRYANT,

Appellants

v.

NATIONSBANK OF TEXAS,

Appellee

On Appeal From the 12th Judicial District Court of
Walker County, Texas
Hon. William L. McAdams, Judge Presiding

BRIEF OF APPELLANTS

(Filed Feb. 27, 1996)

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ORAL ARGUMENT REQUESTED

* * *

POINT OF ERROR 9. Allowing a bank to exercise a set-off against direct-deposited Social Security benefits, before beneficiary has access to them, would conflict with the language and purpose of 42 U.S.C. §407(a) and violate the Supremacy Clause of the United States Constitution, art. VI, cl.2. 19

* * *

Social Security Anti-Attachment Provision

Social Security benefits enjoy a special status under federal law. They are afforded a broad protection from the claims of creditors in the anti-attachment provision in Chapter 7 of the Social Security Act. The section in question says:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

42 U.S.C. § 407. (See Addendum to Appellants' Brief, p. 1).

This protection which Social Security benefits are afforded is maintained even after those Social Security benefits are deposited in a checking or savings account and are co-mingled with funds from other sources. *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416, 34 L.Ed.2d 608, 611, 93 S.Ct. 590, 592-93 (1973); *NCNB Financial Services, Inc. v. Shumate*, 829 F.Supp. 178, 180 (W.D.Va. 1993). In *NCNB v. Shumate*, NationsBank of North Carolina (previously known as NCNB National Bank of North Carolina, previously NCNB Financial Services) issued a notice of lien to Shumate's bank on Shumate's checking account, into which he had deposited some Social Security benefits as well as some other funds which were not exempt from attachment. The federal district court for the Western District of Virginia held that Shumate was entitled to protection of that portion of his bank account funds which are "reasonably traceable to Social Security income." *Id.* at 180-81. In order to determine what dollar amount of funds is entitled to protection, the court said you follow the "first in, first out" accounting method, which means that the first money which is deposited into the account is considered the first money which is spent out of the account. *Id.* at 181. Following that method, the court calculated the amount of Social Security benefits which were protected from attachment.

In the case at bar, the customer service representative for Defendant NationsBank, Rhonda Fleming, testified that the bank does not deal with Social Security benefits in any special way, and likened the deposit of money into an account to pouring water into a bucket. She said that it

co-mingles and is not specified as Social Security benefits. (Rec. Statement of Facts, Rhonda Fleming, pp. 206, 205). However, it is clear in the case at bar that at least the August 3 Social Security benefits of $386.00 and $386.00 for Appellants' Lillian Derryberry and James L. Bryant, respectively, are clearly identifiable and retain their character as Social Security benefits according to the first in, first out principle. (See Rec. Statement of Facts, Plaintiffs' Exhibit 19, 9th page). NationsBank put a hold on Lillian Derryberry's account in July of 1990. They held the account frozen until after August 3, 1990, when Social Security benefit checks of $386.00 each for Mrs. Derryberry and her son were deposited into her checking account. Mrs. Derryberry testified that she was not able to stop the direct deposit of her Social Security checks[1] into the bank for August of 1990. (Rec. Statement of Facts, Lillian Derryberry, p. 105). Mrs. Derryberry and her son never had any access to that money. Defendant NationsBank then took the Social Security checks and all other money in her account and mailed it off on August 6, 1990 to the U.S. Treasury to pay off NationsBank's debt to the U.S. Government. There is no question that the two August Social Security deposits for $386.00 each are reasonably traceable to Social Security benefits, following the first in, first out principle, since Mrs. Derryberry did not and could not spend anything out of the account after August 3, because her account had been frozen in the prior month.

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[1] The use of the term "check" is common, but probably not descriptive. When benefits are direct-deposited, the bank receives an electronic transfer, not a paper check.

If Mrs. Derryberry had any liability for V.A. overpayments, which Appellant contends she did not, see discussion of V.A. overpayments below, that would not alter the attachment protection enjoyed by the Social Security benefits of Mrs. Derryberry and her minor son, James L. Bryant. The Social Security anti-attachment provision specifically says that no other provision of law enacted either before or after the anti-attachment provision may be interpreted to either limit or modify or supersede 42 U.S.C. § 407(a) unless it makes specific reference to § 407. 42 U.S.C. § 407(b). The law regarding V.A. overpayments, 38 U.S.C. § 5302, makes no reference to the Social Security anti-attachment statute and thus, does not modify or supersede it. See 38 U.S.C. § 1 to end.

The Defendant Appellee NationsBank argued that 42 U.S.C. § 407 was not applicable in the case at bar because they were taking the funds out of Mrs. Derryberry's checking account pursuant to a "set-off" provision on the back page of her checking account agreement with the bank. See Rec. Statement of Facts, Defendant's Exhibit 8. The set-off provision to which the Defendants referred is contained at the bottom of the page on Defendant's Exhibit 8 and is entitled, in bold print, "Set-Off." It reads as follows:

> By signing this form you each agree that we may at any time (without prior notice, except as prohibited by law) set-off the funds in this account against any debt owed to us now or in the future, by any of you having the right of withdrawal, subject to any limit on the right of withdrawal from this account by such person or legal entity.

> This right of set-off does not apply to this account if: (a) it is an IRA or a tax-deferred retirement account; or (b) the debt is created by consumer credit transaction under a credit card plan; or (c) the debtor's right of withdrawal arises only in a representative capacity.

The Defendant contends that because its taking of the Plaintiffs' Social Security money was pursuant to a set-off, and "set-off" is not specifically referred to in 42 U.S.C § 407, then the federal statute is inapplicable. Defendant's reliance on the set-off paragraph is premised on the notion that Lillian Derryberry owed the bank for the amount which the bank owed to the government for the V.A. payments which the bank received after Mr. Derryberry's death. This is wrong as a matter of law and fact, see discussion *supra* re liability for V.A. overpayments and Reclamation of Overpayments. However, if Defendant's argument is accepted, then the purpose of § 407, to preserve Social Security benefits to meet the current living expenses of Social Security beneficiaries, is defeated; and furthermore, in a day and age when direct deposit by electronic banking services is common, many Social Security beneficiaries would be denied the protection intended by 42 U.S.C. § 407.

The bank cited *Frazier v. Marine Midland Bank*, 702 F.Supp. 1000 (W.D.N.Y. 1988) for the proposition that the exercise of set-off by a bank does not violate the Social Security anti-attachment provision. That case is inapplicable because it does not involve direct deposit of Social Security benefits, nor even in-person deposit of Social Security checks. The money in the bank account in *Frazier* came primarily from cash deposits. The 42 U.S.C. § 407(a)

claim asserted in that case was based on the fact that the Social Security beneficiary received her Social Security checks, cashed them, and then put some of the cash into her checking account with the bank.

> [T]he record shows that all deposits made to Plaintiff's checking account with Marine between July 1985 (the date on which Plaintiff opened her account) and January 6, 1987 (the date on which Plaintiff made her last deposit prior to the set-off) were in-branch teller transactions consisting primarily of cash. Indeed, out of some eighty-five deposits made during that period, only eleven included checks, and only one of those checks was issued by the government.

Id. at 1003-1004.

The terms of the checking account did not provide for direct deposit of any funds into the account, *Id.* at 1001, and a New York statute prohibited the bank from "setting off against any depository account which is subject to an agreement between the depositor and the bank for the direct deposit of Social Security or Supplemental Security Income benefit payments." *Id.* at 1004. The court pointed out that the Plaintiff continued to receive her Social Security benefits, was not impaired in her ability to care for herself, and all she had to do was close that account and open another one to prevent the bank from having any access to her money. *Id.* at 1003. The court said that § 407 was inapplicable because the debtor's ability to care for herself was not implicated. *Id.* at 1003. In contrast, in the case at bar, Mrs. Derryberry's checks were direct-deposited; she had no way to prevent the

August checks from going to the bank; and her ability to care for herself and her son were impaired.

The bank cited *In re Gillespie*, 41 B.R. 810 (Bankr. D.Colo. 1984) for the proposition that set-off is not a legal process and therefore not applicable to § 407. *Gillespie v. Cherry Creek National Bank*, 41 B.R. 810, 6 Soc.Sec.Rep.Ser. 925, CCH Unempl.Ins.Rep. P.15. 922 involves an action to avoid a preferential transfer in a bankruptcy case. The Social Security recipient had been allowing the bank to take loan payments on an installment loan out of his checking account each month from May, 1983 through May, 1984. The bank sent him concurrent debit slips and monthly checking account statements and he never complained. The court pointed out that if Gillespie didn't consent to this, all he had to do was close his account. "He chose not to do this. He also chose to acquiesce in the procedure." *Id.* 41 B.R. at 812. Not surprisingly, the court said that the debtor's inaction for almost a year constituted an agreement to the bank's set-off of his checking account and thus, he had waived any exemption that he had for his Social Security payments. Arguably, that case is distinguishable from and not applicable to the case at bar. Otherwise, application of that case to the facts of the case at bar would violate the purposes of § 407 and thus, the case should not be followed.

Analyzing the facts of this case in terms of the intent and purpose of the statute, all of the terms used in 42 U.S.C. § 407, except "garnishment" or "bankruptcy or insolvency" are applicable to Defendant's actions. The set-off exercised by Defendant NationsBank is contrary to the plain language of § 407, giving the terms their ordinary meaning, in protecting Social Security benefits from

transfer, assignment, execution, levy, or other legal process.

BLACK'S LAW DICTIONARY defines relevant terms as follows:

> **Assignment**. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.
>
> BLACK'S LAW DICTIONARY 109 (5th ed. 1979).
>
> ***Assignment of account***. Transfer to assignee giving him a right to have moneys when collected applied to payment of his debt.
>
> *Id.* at 109.
>
> **Transfer**. . . . Transfer means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property.
>
> *Id.* at 1342.
>
> **Set-off**. A counterclaim. . . . A claim filed by a defendant against the plaintiff.
>
> *Id.* at 1230.
>
> **Recoupment**. . . . Recoupment is the equivalent of the old counterclaim . . . *Set-off distinguished*. A "set-off" is a demand which the defendant has against the plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action, whereas a "recoupment" is a reduction or rebate by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the same transaction.

Id. at 1146-1147.

> **Offset**. A deduction; a counterclaim; a contrary claim or demand by which a given claim may be lessened or canceled.

Id. at 979.

The federal law prevents transfer or assignment of future benefit payments. If Lillian Derryberry agreed to give Defendant any interest in her Social Security benefits, she did so on 10/17/85, when she signed the checking account agreement. (Rec. Statement of Facts, Plaintiffs' Exhibit 1 and Defendant's Exhibit 8), five years *before* she received the Social Security payments.

A "set-off" is a counterclaim, which is a legal process. In the contract, the term could be interpreted to mean "offset," to be effectuated by self-help without resort to court. In a military benefits case, the U.S. Supreme Court said a prohibition against anticipation or attachment could not be circumvented by using an offset. See discussion of *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981) *supra*. Whatever you call the devise by which the bank claimed an interest in the two August Social Security payments, it was a transfer of interest in future payments.

One case involving the anti-attachment provision of the Social Security Act with language similar to the bank's "set-off" agreement is the one involving an "agreement to reimburse" which had been executed by a Social Security beneficiary in *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 34 L.Ed.2d 608, 93 S.Ct. 590 (1973). In the *Philpott v. Essex County* case, a county welfare board in New Jersey sued a Social Security recipient and

his trustee in order to try reach a bank account in which the recipient's trustee had deposited a check for retroactive Social Security benefits. The Social Security beneficiary had previously received some welfare benefits from the New Jersey county. As a condition of receiving that assistance, he had to execute an "agreement to reimburse." The county had obtained the agreement to reimburse pursuant to a state law which said:

> The county welfare board shall take from each applicant a properly acknowledged agreement to reimburse for all advances granted, and pursuant to such agreement, said applicant shall assign to the welfare board, as collateral security for such advances, all or any part of his personal property as the board shall specify.

Id. 409 U.S. at 414, note 2, 34 L.Ed.2d at 610, note 2. The following year, the welfare recipient began receiving Social Security benefits which were deposited into a bank account by his trustee, Philpott. The New Jersey County Welfare Board sued to reach the bank account under the terms of the agreement to reimburse.

The U.S. Supreme Court held that the Social Security anti-attachment provision, 42 U.S.C. § 407, barred the State of New Jersey from reaching the Social Security benefits. *Id.*, 409 U.S. 414-417, 34 L.Ed.2d 610-612. The Court pointed out that it saw no reason why New Jersey should be in any preferred position as compared to other creditors. In the case at bar, NationsBank's argument puts it in a better position than other creditors would have been. New Jersey also had a written agreement with the Social Security beneficiary which gave them an interest in his property (which would include his bank account), but

the Supreme Court said federal law barred New Jersey from reaching the Social Security money pursuant to that agreement. In the case at bar, Defendants argue that they have an agreement which gives them an interest in Mrs. Derryberry's checking account, which they concede, I assume, would be protected from any court-ordered legal process. Yet they argue this set-off agreement puts them in a superior position than would be any other creditor, even the State of New Jersey, with a state court judgment.

In the case at bar, the trial court agreed with Defendants that a set-off agreement was not covered by the Social Security anti-attachment provision, where the account holder and the bank have contracted between themselves. (Rec. Statement of Facts, Directed Verdict Arguments, pp. 325-328). Appellant found no Texas cases on this issue. Generally, a contract term in contravention of a statute is void or unenforceable. *Miller v. Long-Bell Lumber Co.*, 222 S.W.2d 244 (Tex. 1949); *Lewis v. Davis*, 199 S.W.2d 146 (Tex. 1947); *Cundiff v. Campbell*, 40 Tex. 142 (1874); *King v. Matney*, 259 S.W.2d 606 (Tex.Civ.App. 1953, writ ref n.r.e.). The purpose of the legislation and the particular evil it was intended to avoid determines whether the contract term should be held invalid. *Paragon Oil Syndicate v. Rhoades Drilling Co.*, 277 S.W. 1036 (Tex. 1925); *American Nat. Ins. Co. v. Tabor*, 230 S.W. 397 (Tex. 1921); *Republic Trust Co. v. Taylor*, 184 S.W. 772 (Tex. 1916). Understandably, the trial court would have liked some guidance from case law in a similar situation involving the term "set-off" and its coverage by the Social Security anti-attachment provision; however, apparently the specific situation in the case at bar has not been addressed in Texas. Appellant suggests that NationsBank's contractual

right of set-off against Lillian Derryberry's checking account was of the same substantive nature as the agreement to reimburse involved in the *Philpott v. Essex County Welfare Bd.* case, and is a transfer, assignment, attachment, or other legal process, within the meaning of 42 U.S.C. § 407. In successfully arguing before the trial court for an instructed verdict, the Defendant cited no Texas case which said a contractual or common law or statutory right of set-off by the bank allowed the bank to take Social Security benefits. However, if such were to be the law of Texas, it would be in conflict with 42 U.S.C. § 407, and would be preempted by federal law under the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI, cl.2.

POINT OF ERROR 9. Allowing a bank to exercise a set-off against direct-deposited Social Security benefits, before beneficiary has access to them, would conflict with the language and purpose of 42 U.S.C. § 407(a) and violate the Supremacy Clause of the United States Constitution, art. VI, cl.2.

In looking at similar anti-attachment provisions in other federal benefits programs such as military retirement benefits and railroad retirement benefits, the U.S. Supreme Court has interpreted the anti-attachment provisions broadly and has held state common law or statutory provisions preempted by the Supremacy Clause of the United States Constitution when they conflicted with the purposes of the anti-attachment provisions in question. In *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 59 L.Ed.2d 1, 99 S.Ct. 802 (1979), the court considered an anti-attachment provision which protected railroad retirement benefits

from "garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." *Id.* 439 U.S. at 576, 59 L.Ed.2d at 7. The Court held that an award to the wife of a husband's interest in railroad retirement benefits conflicted with the anti-attachment provision. "Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time. This vulnerability to Congressional edict contrasts strongly with the protection Congress has afforded recipients from creditors . . . " *Id.* 439 U.S. at 575, 59 L.Ed.2d at 7. The award to the wife of a community property interest in her husband's railroad retirement benefits did not appear to be prohibited by the specific terms of the anti-attachment provision in question, since it was not a garnishment, attachment, or other legal process. However, the Court pointed out that such an award would conflict with the Congressional purpose of preserving the benefits for the beneficiary, and thus was prohibited by the Supremacy Clause. *Id.* 439 U.S. at 590, 59 L.Ed.2d at 16.

In *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981), the Court held that the state court community property division of military retirement benefits was precluded by federal law because it conflicted with the Congressional purpose of preserving the entire benefit for the use of the beneficiary. The military retirement benefit statute in question did not have a specific anti-attachment provision as in the Social Security Act. However, the Court looked at the statutory scheme in its entirety, found an intent by Congress that the benefits actually reached the beneficiary, and concluded that if the

benefits could be defeated by state process or otherwise, then the objectives of the federal program would be impaired. *Id.* 453 U.S. at 228-232, 69 L.Ed.2d at 603-606. Although the Court did not use the term "set-off," it does, by way of dicta, say that the state court could not get around the federal statute by use of an "offset." In looking to determine the purpose of the statutory scheme, the Court noted that a military person could not "assign" his pay. The Court characterized the prohibition against "anticipation" as a prohibition against "attachment." "But even if there were no explicit prohibition against 'anticipation' here, it is clear that the injunction against attachment is not to be circumvented by a simple expedient of an **offset** [emphasis added] award." *McCarty v. McCarty*, 453 U.S. at 229, note 22, 69 L.Ed.2d at 609, note 22.

The *McCarty* case *supra* dealt with military non-disability retirement benefits. Looking at veteran's disability benefits, in *Rose v. Rose*, 481 U.S. 619, 95 L.Ed.2d 599, 107 S.Ct. 2029 (1987), the Court held that a state court order requiring child support payments out of veteran's disability benefits was not preempted by federal law because it would not conflict with the purpose of the statutory benefits scheme. The case gives an excellent history of the Court's prior decisions dealing with state law preemption by federal statutes containing prohibitions against attachment, levy, or seizure of federal benefits. *Id.* 481 U.S. at 631-634, 95 L.Ed.2d at 611-613. In contract [sic] to the benefits schemes involved in its prior cases, the Supreme Court pointed out that the veteran's disability benefits were intended to support not only the veteran but also his family as well. Thus, a holding that the anti-attachment provision was not applicable would

not undermine the federal purpose but would rather further it in that case. *Id.* 481 U.S. at 634, 95 L.Ed.2d at 612-613. There is no question in the case at bar that allowing the bank to exercise a set-off question Mrs. Derryberry's Social Security checks would undermine the purpose of the federal Social Security statute of making benefits available to meet the current living expenses of the beneficiaries, and did in fact impair Mrs. Derryberry's ability to meet the current living expenses of herself and her son.

* * *

APPENDIX M

Petitioner's Petition for Review
to Texas Supreme Court.
Issues for Review and Argument on
42 U.S.C. § 407 and Supremacy Clause.

NO. 98-0353

IN THE
SUPREME COURT OF TEXAS

LILLIAN C. DERRYBERRY,
Individually, And As Next
Friend For JAMES L. BRYANT

Petitioner,

v.

NATIONSBANK OF TEXAS,

Respondent.

On Appeal From the First Court of Appeals
Houston, Texas No. 01-95-01438-CV

PETITION FOR REVIEW

(Filed Apr. 20, 1998)

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BY: /s/ Brenda Willett
BRENDA WILLETT

ISSUES PRESENTED

Set-Off Against Social Security Benefits

1) Does a bank's exercise of a contractual right of set-off, against an account containing social security benefits, violate the federal Social Security anti-attachment provision at 42 U.S.C. § 407, which protects Social Security benefits from assignment, attachment, transfer, execution or levy.

2) Does a bank's exercise of set-off against direct-deposited social security benefits, before the beneficiary has access to them, violate the Social Security anti-attachment provision at 42 U.S.C § 407.

3) Is the Court of Appeals decision, that Texas law permits a bank to exercise a contractual right of set-off against an account containing social security benefits and against direct-deposited social security benefits before they reach the beneficiary, inconsistent with 42 U.S.C. § 407? Is the decision inconsistent with the U.S. Supreme Court decision in *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973)? Does the decision violate the Supremacy Clause of the U.S. Constitution?

* * *

Set-Off by Bank Against Social Security Benefits

The bank's exercise of a contractual right of set-off against social security benefits in a customer's account violates the Social Security anti-attachment provision at 42 U.S.C. § 407.

The Court of Appeals held that NationsBank's contractual right of set-off (exercised in August of 1990)

arose from a contractual provision in the deposit agreement signed by Mrs. Derryberry in 1985. (Appendix, p. 12 and p. 38). An assignment of interest in future social security payments is specifically prohibited by 42 U.S.C. § 407. (Appendix, p. 22).

The Court of Appeals held that a private agreement between the bank and social security beneficiary that gives the bank a right of set-off against social security benefits is not prohibited by 42 U.S.C. § 407 because it is not a legal process. That decision is in conflict with the statute and *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 34 L.Ed.2d 608, 93 S.Ct. 590 (1973), and violates the Supremacy Clause of the U.S. Constitution, art. VI, cl.2.

There are no cases, Texas or otherwise, involving a bank's taking of direct-deposited Social Security benefits before the beneficiary has access to them. There are several U.S. Supreme Court decisions (see Argument) which hold that an anti-attachment provision in benefits programs prohibits various types of claims that would thwart the purposes of the benefits program. Allowing a bank to set-off against direct-deposited social security benefits before they reach the beneficiary thwarts the purpose of the anti-attachment provision of the Social Security Act, which is to ensure that benefits be available to recipients to meet current living expenses.

There is no Texas case law on whether a bank may be liable for conversion for freezing a customer's account, waiting for direct-deposited social security benefits to arrive via electronic deposit, wrongfully taking the benefits before they reach the beneficiary, and using them to pay part of the bank's debt to the federal government.

Reasons to Grant Review

The Court of Appeals has decided important questions of state law that should be but have not been resolved by the Texas Supreme Court. T.R.A.P. 56.1(a)(6). This case involves construction of a federal statute, and the appellate decision violates the Supremacy Clause of the U.S. Constitution. *Id.* 56.1(a)(3) and (4). The errors of law by the appellate court are important to the state's jurisprudence because they impair the ability of a vulnerable segment of the population (elderly, disabled, and children) to meet their basic needs for survival, and should be corrected by this Court. *Id.* 56.1(a)(5).

ARGUMENT

I. SET-OFF BY BANK AGAINST SOCIAL SECURITY BENEFITS

Reason to Grant Petition for Review

The Court of Appeals gave very short shrift (a one page discussion) to an issue of importance, possibly survival, to disabled, elderly, poor, and minor persons. It relied on *Frazier v. Marine Midland Bank*, 702 F.Supp. 1000 (W.D.N.Y. 1988) and *Gillespie v. Cherry Creek National Bank*, 41 B.R. 810 (Bankr.D.Colo. 1984), in holding that NationsBank's seizure of Lillian Derryberry's and James Bryant's August Social Security checks did not violate the Social Security anti-attachment law. Neither *Frazier* nor *Gillespie* involved taking direct-deposited Social Security benefits before they reached the beneficiary. *Frazier* involved in-person cash deposits. The issue in *Gillespie* was a preferential transfer in a bankruptcy and the court said that the debtor had agreed to the bank's taking

monthly loan payments out of his account. There are no Texas cases involving this issue.

Because of the importance of this issue to a very vulnerable segment of the population and the absence of Texas cases this Court should address the issue. The Court of Appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. Tex. R. of App. Proc.56.1(a)5).

This issue has not been decided by the Texas Supreme Court. The Court of Appeals decision is in conflict with a federal statute and thus violates the Supremacy Clause, art. VI, cl. 2, of the U.S. Constitution. Because the case involves construction of a statute and a constitutional issue, and because the Court of appeal's decision conflicts with the U.S. Supreme Court decision in *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973), the Texas Supreme Court should grant review. T.R.A.P. 56.1(a)(3), (4), and (5).

Social Security Anti-Attachment Provision

Social Security benefits enjoy a special status under federal law. They are afforded a broad protection from the claims of creditors in the anti-attachment provision of the Social Security Act. 42 U.S.C. § 407. (Appendix p. 22).

This protection afforded Social Security benefits is maintained even after they are deposited in a checking or savings account and are co-mingled with funds from other sources. *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416, 34 L.Ed.2d 608, 611, 93 S.Ct. 590, 592-93 (1973); *NCNB Financial Services, Inc. v. Shumate*, 829 F.Supp. 178,

180 (W.D.Va. 1993). Shumate held that the bank customer was entitled to protection of that portion of his bank account funds which are "reasonable traceable to Social Security income." *Id.* at 180-81. To determine what dollar amount of funds is entitled to protection, the court said to follow the "first in, first out" accounting method: the first money deposited into the account is considered the first money spent out of the account. *Id.* at 181.

Here it is clear that at least the August Social Security benefits are clearly identifiable and retain their character as Social Security benefits according to the first in, first out principle. (RR, Plaintiffs' Exhibit 19, 9th page). NationsBank put a hold on Lillian Derryberry's account in July of 1990 and held it frozen until after August 3, 1990, when Social Security benefit checks of $386.00 each for Mrs. Derryberry and her son were deposited into her checking account. Mrs. Berryberry was not able to stop the electronic transfers of the August Social Security checks to the bank. Mrs. Derryberry and her son never had any access to that money. There is no question that the August Social Security deposits of $386.00 each are traceable to Social Security benefits since Mrs. Derryberry could not access the account after August 3 because it had been frozen in the prior month.

The Court of Appeals said that the bank took Lillian Derryberry's and James Bryant's social security benefits by "set-off", which does not require judicial intervention and therefore is not prohibited by 42 U.S.C. § 407. The Court of Appeals said the bank acquired its right of set-off from the deposit agreement which Lillian Derryberry signed with Huntsville Bank in 1985. (Appendix, p. 12).

Lillian Derryberry and the infant James Bryant were neither receiving nor entitled to social security benefits in 1985. By the Court of Appeal's reasoning, Lillian Derryberry must have made a contingent assignment in 1985 of part of their future rights. The statute specifically prohibits any transfer or assignment of rights to any future payments.

Clearly all the rights in the social security benefits, present and future, rested in Lillian Derryberry and James Bryant, but for the set-off agreement. Even after the benefits were deposited in an account and co-mingled with other funds, the statute protected their rights. When and how did they lose those rights? Did the 1985 deposit agreement transfer the plaintiffs' rights to the bank? Did the 1985 deposit agreement waive the plaintiffs' protections under 42 U.S.C. § 407? Either interpretation thwarts the statutory purpose of assuring that benefits reach the beneficiaries and are available to meet current needs.

In *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 34 L.Ed.2d 608, 93 S.Ct. 590 (1973), a Social Security recipient had received some welfare benefits, and as a condition of receiving that assistance, he had to execute an "agreement to reimburse." *Id.* 409 U.S. at 414, note 2, 34 L.Ed.2d at 610, note 2. The following year, he began receiving Social Security benefits which were deposited into a bank account by his trustee, Philpott. The New Jersey County Welfare Board sued to reach the bank account under the terms of the agreement to reimburse.

The U.S. Supreme Court held that the Social Security anti-attachment provision, 42 U.S.C. § 407, barred the State of New Jersey from reaching the Social Security

benefits. *Id.*, 409 U.S. 414-417, 34 L.Ed.2d 610-612. Like NationsBank, New Jersey had a written agreement with the Social Security beneficiary which gave them an interest in his property (including his bank account), but the Supreme Court said federal law barred New Jersey from reaching the Social Security money pursuant to that agreement.

In this case, the Appeals Court held that a set-off agreement was a self-help procedure, not a legal process, and thus was not covered by the Social Security anti-attachment provision. Petitioner found no Texas cases on this issue. Generally, however, a contract term in contravention of a statute is void or unenforceable. *Miller v. Long-Bell Lumber Co.*, 222 S.W.2d 244 (Tex. 1949); *Lewis v. Davis*, 199 S.W.2d 146 (Tex. 1947); *Cundiff v. Campbell*, 40 Tex. 142 (1874). The purpose of the legislation and the particular evil it was intended to avoid determines whether the contract term should be held invalid. *Paragon Oil Syndicate v. Rhoades Drilling Co.*, 277 S.W. 1036 (Tex. 1925); *American Nat. Ins. Co. v. Tabor*, 230 S.W. 397 (Tex. 1921); *Republic Trust Co. v. Taylor*, 184 S.W. 772 (Tex. 1916). Defendant cited no Texas case which said a contractual or common law or statutory right of set-off by the bank allowed the bank to take Social Security benefits. However, if such were to be the law of Texas, it would be in conflict with 42 U.S.C. § 407, and would be preempted by federal law under the Supremacy Clause of the United States Constitution. U.S.Const. art. VI, cl.2.

The U.S. Supreme Court has interpreted the anti-attachment provisions broadly in other federal benefits programs and has held state common law or statutory provisions preempted by the Supremacy Clause of the

United States Constitution when they conflicted with the purposes of anti-attachment provisions. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 59 L.Ed.2d 1, 99 S.Ct. 802 (1979), the court considered an anti-attachment provision which protected railroad retirement benefits from "garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." *Id.* 439 U.S. at 576, 59 L.Ed.2d at 7. The award to the wife of a community property interest in her husband's railroad retirement benefits did not appear to be prohibited by the specific terms of the anti-attachment provision in question, since it was not a garnishment, attachment, or other legal process. However, the Court said the award would conflict with the Congressional purpose of preserving the benefit for the beneficiary, and thus was prohibited by the Supremacy Clause. *Id.* 439 U.S. at 590, 59 L.Ed.2d at 16.

In *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981), the Court held that the state court community property division of military retirement benefits was precluded by federal law because it conflicted with the Congressional purpose of preserving the entire benefit for use by the beneficiary. Unlike the Social Security Act, the military retirement benefits statute did not have a specific anti-attachment provision. However, the Court viewed the statutory scheme in its entirety, found that Congress intended that the benefits reach the beneficiary, and concluded that if the benefits could be reached by state process or otherwise, the objectives of the federal program would be impaired. *Id.* 453 U.S. at 228-232, 69 L.Ed.2d at 603-606.

Blacks Law Dictionary (5th ed 1979) at p. 109 defines a "set-off" as a counterclaim, a legal process. In the deposit agreement, the term obviously means "offset," which is a deduction by which a given claim may be reduced. *Id.* at 979. Although the Court in *McCarty* did not use the term "set-off," it did, by way of dicta, say the state court could not get around the federal statute by use of an "offset." "But even if there were no explicit prohibition against 'anticipation' here, it is clear that the injunction against attachment is not to be circumvented by a simple expedient of an **offset** [emphasis added] award." *McCarty v. McCarty*, 453 U.S. at 229, note 22, L.Ed.2d at 609, note 22.

In *Rose v. Rose*, 481 U.S. 619, 95 L.Ed.2d 599, 107 S.Ct. 2029 (1987), the Court held that a state court order requiring child support payments out of veteran's disability benefits was not preempted by federal law because it would not conflict with the purpose of the statutory benefits scheme. In contrast to the benefits schemes involved in its prior cases, the Supreme Court pointed out that the veteran's disability benefits were intended to support not only the veteran but also his family. Thus, a holding that the anti-attachment provision was not applicable to child support payments would not undermine the federal purpose but rather further it. *Id.* 481 U.S. at 634, 95 L.Ed.2d at 612-613. In the case at bar, allowing the bank to exercise a set-off against Mrs. Derryberry's Social Security would undermine the purpose of the federal Social Security statute of making benefits available to meet current living expenses of the beneficiaries.

II. Banking Institutions Should Not Be Allowed to Benefit from Technological Advances to the Detriment of Social Security Beneficiaries

Technological advances have eroded protections historically used by Social Security recipients to protect their life-sustaining benefits. Prior to the advent of direct deposits individuals received benefits personally and could elect not to deposit them into disputed accounts. However, with direct deposits recipients are deprived of the ability to immediately halt the transfer of their benefits.

To permit banking institutions to intercept these benefits thwarts congressional intent and shifts control of those benefits into the hands of financial institutions. By obstructing the flow of benefits to recipients, banks are undermining the intent of the Social Security Act legislation. With regard to public benefits, financial institutions should behave more like a trustee than a creditor, and should be held liable when they divert social security benefits away from the intended beneficiary.

* * *

APPENDIX N

Set-Off Provision in Bank's deposit agreement with customers.

"Set-off provision in the bank's checking account deposit agreement."

By signing this form you each agree that we may at any time (without prior notice, except as prohibited by law) set-off the funds in this account against any debt owed to us now or in the future, by any of you having the right of withdrawal, subject to any limit on the right of withdrawal from this account by such person or legal entity.

This right of set-off does not apply to this account if: (a) it is an IRA or a tax-deferred retirment account; or (b) the debt is created by consumer credit transaction under a credit card plan; or (c) the debtor's right of withdrawal arises only in a representative capacity.

Supreme Court, U.S.
FILED
DEC 18 1998
OFFICE OF THE CLERK

No. 98-842

In The

Supreme Court of the United States

October Term, 1998

LILLIAN DERRYBERRY,
Individually, and as Next Friend of James L. Bryant,
Petitioner,

v.

NATIONSBANK OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari To The Texas First Court Of Appeals

BRIEF IN OPPOSITION

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CORPORATE STATEMENT

NationsBank's parent company is NB Holdings Corporation. NationsBank's nonwholly-owned subsidiaries are:

1. BBI Merchant Processing Company, LLC (94.952%)
2. Community Reinvestment Group, L.C. (61.5%)
3. Education Financing Services, LLC (capped at 22.6%)
4. First Housing Development Corporation of Florida (21.0%)
5. Heathrow, Inc. – common stock (45.206%) – preferred stock (49.894%)
6. Montgomery Homes Limited Partnership II (33.3%)
7. Savannah Community Development Corporation (21%)
8. Tower Holdings, L.P. (99%)

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ARGUMENT

The role of the Supreme Court is to harmonize the law by resolving conflicts within a court of appeals or between the courts of appeals, to interpret statutory and constitutional provisions, and to resolve important issues of law. As a leading commentator has observed:

> [T]he U.S. Supreme Court cannot possibly hear all litigants who present a worthy claim that a lower court has committed an error falling within its corrective jurisdiction. Both the justices and commentators agree that the Court must husband its scarce adjudicatory resources for the most fundamental constitutional and statutory questions, along with an occasional question of federal common law, sparing such additional energy as it can muster to seek as much uniformity as possible on lesser questions.

Wright et al., *Federal Practice and Procedure*, § 4001, at 4 (2d ed. 1996).

This case does not justify the allocation of resources necessary to address the issues involved, and the Court would likely affirm after spending those resources. Thus, the Petition should be denied.

I. This case is not of the character typically reviewed by the Court because the Texas Court of Appeals' opinion does not conflict with any opinion of the Court.

Rule 10 of the Rules of the Supreme Court of the United States "indicate[ ] the character of the reasons measuring the Court's discretion" in reviewing petitions for writs of certiorari. In particular, when the challenged

opinion was issued by an intermediate state court, review usually is limited to important federal questions or issues decided contrary to a prior opinion of the Court.[1]

The present petition seeks a writ to an intermediate Texas appellate court. Because the United States Supreme Court has never addressed the issue raised in the Petition, and because the issue is not important to the nation's jurisprudence, Rule 10(c) is not implicated. Therefore, the Petition should be denied.

II. This case does not present a good opportunity to review the issue raised in the Petition because the facts are atypical.

Ms. Derryberry asserts that this case closely parallels *Tom v. First American Credit Union*[2], in which a credit union enforced a preexisting debt by exercising a contractual right of setoff against its customer's traceable social security funds. The credit union argued that setoff was not a "legal process" and thus was not prohibited by 42 U.S.C. § 407(a). The Tenth Circuit rejected this argument.[3] If the credit union had petitioned for a writ of certiorari, this Court would have had an opportunity to address the argument. No such petition was filed.

Although this case implicates the same issue, other issues muddy the waters and alter the equities. NationsBank became Ms. Derryberry's creditor only through the

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[1] Rule 10(c).

[2] 151 F.3d 1289 (10th Cir. 1998).

[3] *Id.* at 1291-93.

machinations of a complex, bizarre, and rarely litigated federal regulation which obligated NationsBank to repay the Federal government for excess VA benefits paid to Ms. Derryberry. After returning the funds to the Federal government, NationsBank became entitled to recoup those funds from Ms. Derryberry. If the Court adopts the Tenth Circuit's rationale from *Tom*, NationsBank will be left with an out-of-pocket loss through no fault of its own.

In *Tom*, the Tenth Circuit gave greater weight to the rights of social security recipients than the rights of banks attempting to collect debts:

> [W]e will not create an exception [to Section 407(a)] that would, for the most part, serve very private interests – banks' desires to cut bad-debt losses.

In contrast, the present case involves a choice between two unsavory options: (1) depriving an elderly woman of her social security funds, or (2) arbitrarily imposing liability on a bank that did nothing wrong and that did not assume risk voluntarily. The Court should not settle an area of law on such atypical facts.

Also, the Court should note that the courts below have not left Ms. Derryberry without relief. The Texas Court of Appeals reinstated her state-law claim for breach of contract, and the Texas Supreme Court denied NationsBank's Petition for Review. Thus, Ms. Derryberry will get a new trial even if the Court denies the present Petition.

III. The Court should not settle this issue until more lower courts have a chance to address it.

NationsBank has found only four published opinions addressing whether setoff against social security proceeds violates Section 407(a). The two circuit-level opinions[4] are the most recent, and both hold that Section 407(a) prohibits setoff. The two older opinions, one by a district court[5] and one by a bankruptcy court,[6] disagree, but neither was appealed to the circuit level. Thus, there is no circuit split. The Court should not settle the issue until other courts are given the opportunity to develop all available arguments.

IV. The Court should not allocate its resources to this case because the opinion below is unpublished.

When the Court grants certiorari, it often does so not only to adjudicate the present case but also to prevent lower courts in future cases from relying upon bad precedent. In this case, no such benefit would result because the opinion was not published:

> Opinions not designated for publication by the court of appeals have no precedential value and

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[4] *Tom v. First Am. Credit Union*, 151 F.3d 1289, 1291-93 (10th Cir. 1998); *Crawford v. Gould*, 56 F.3d 1162, 1166 (9th Cir. 1995).

[5] *Frazier v. Marine Midland Bank, N.A.*, 702 F. Supp. 1000, 1003 (W.D.N.Y. 1988).

[6] *In re Gillespie*, 41 B.R. 810, 812 (Bankr. D. Colo. 1984).

> must not be cited as authority by counsel or by a court.[7]

Thus, lawyers and judges will not rely upon the opinion below and the Court does not need to scrutinize that precedent.

V. Ms. Derryberry did not properly present all of her arguments to the trial court below.

Ms. Derryberry alleges two distinct violations of Section 407(a). First, she alleges a violation of the first sentence, which prohibits "execution, levy, attachment, garnishment, or other legal process" against Social Security proceeds. This argument was properly presented to the courts below.

Second, Ms. Derryberry argues that the deposit agreement is an assignment and therefore violates the second sentence of Section 407(a). This issue was not raised before the trial court (Pet.'s App'x at J-1 to J-11). The issue was raised before the Texas Court of Appeals, but that court's opinion did not address the argument (Pet.'s App'x at A-12 to A-13). Thus, the issue is not properly before the Court.[8]

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[7] Tex. R. App. P. 47.7 (West 1998).

[8] *Bailey v. Anderson* (326 U.S. 203, 207) (holding that a claim raised for the first time before a state appeals court is preserved for review by the United States Supreme Court only if the appellate court expressly passes upon the issue in question); *see also* Tex. R. App. P. 33.1(a) (West 1998) ("As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was timely made to the trial court . . . . ").

VI. The opinion of the Texas Court of Appeals was correct.

Finally, the Court should not review the Texas Court of Appeals' opinion because that court resolved the issue correctly. Section 407(a) (Pet.'s App'x at E-1) protects social security proceeds from "execution, levy, attachment, garnishment, or other legal process." NationsBank did not employ any of the listed remedies. This case therefore turns on whether the right of setoff is an "other legal process." Because setoff is not a legal process, the Texas Court of Appeals' opinion was correct and should not be disturbed.

The common thread connecting the items enumerated in Section 407(a) is the use of state power to seize funds to pay a debt; therefore, the term "other legal process" should be interpreted to include only those acts which share this trait.[9] For example, the appointment of a receiver to take control over social security proceeds would violate Section 407(a), although receivership is not specified as a prohibited remedy.

In contrast, setoff does not employ the state's powers. It is a private, contractual right, not a legal process. Thus, Section 407(a) does not bar setoff.

This reading of the statute comports with the normal usage of the term legal process. A "process" is "any means used by court to acquire or exercise its jurisdiction

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[9] *Brogan v. U.S.*, 118 S. Ct. 805, 809 n.2 (1998).

over a person or over specific property."[10] A "legal process" is any process which is lawful.[11] Thus, Section 407(a) protects social security funds from any means used by a court to acquire or exercise jurisdiction over the funds. The listed items (execution, levy, attachment, and garnishment) all satisfy this definition. Congress evidently was concerned that similar processes, not listed, should be barred as well. The phrase "other legal process" goes no further than that.

The Tenth Circuit in *Tom* claims to read the phrase "other legal process" expansively to accomplish Congress's purposes. In reality, the *Tom* opinion altogether ignored the phrase to reach the desired result.

PRAYER

Because this case does not justify Supreme Court review, and because the decision below was correct, Ms. Derryberry's Petition for Certiorari should be denied.

Respectfully submitted,

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[10] *See Black's Law Dictionary* 1205 (6th ed. 1990).

[11] *Id.*